ORIGINAL

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November 14, 2005

Brian Bozzo
Arizona Corporation Commission
1200 W. Washington Street
Phoenix, Arizona 85007

RE: Johnson Utilities, L.L.C.: Compliance with Decision No. 68236
Quarterly Reports on the status of the pending La Osa and Sonoran litigation
ACC Docket Nos.: WS-02987A-04-0889

Dear Mr. Bozzo:

Pursuant to the above-referenced matter, Johnson Utilities hereby submits this compliance filing in accordance with the Commission's orders. Enclosed please find the court documents for the La Osa and Sonoran Litigation attached hereto as Attachment No. 1 and Attachment No. 2 respectively. Several of the court documents have been excluded from the Docket Control filing due to their voluminous size as discussed in our November 10, 2005 letter to David Ronald. Three copies of the following court documents are being filed with Earnest Johnson, Director of the Utilities Division, for Staff to review along with one copy for your use:

La Osa

Complaint
First Amended Complaint
Motion for Designation as Complex Civil Litigation
States Initial Disclosure Statement
Third Party Disclosure Statement

Sonoran

Complaint
Plaintiff's First Amended Complaints
Answer of Defendents

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If you need any additional information in regards to this compliance item, please do not hesitate to contact me. Thank you for your time and consideration in this matter.

Sincerely,

Daniel Hodges
Johnson Utilities, LLC

Cc: Brian Tompsett, Johnson Utilities
Richard Sallquist, Sallquist, Drummond & O'Connor
Ernest Johnson, Director
Brian Bozzo, Compliance Manager
Docket Control

ATTACHMENT 1

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

STATE OF ARIZONA, ex rel., STEPHEN A. OWENS, Director, Arizona Department of Environmental Quality; MARK WINKLEMAN, Commissioner, Arizona State Land Department; ARIZONA GAME AND FISH COMMISSION; DONALD BUTLER, Director, Arizona Department of Agriculture; ARIZONA BOARD OF REGENTS, on behalf of the Arizona State Museum,

Plaintiffs,

v.

GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife; THE GEORGE H. JOHNSON REVOCABLE TRUST, and GEORGE H. JOHNSON and JANA JOHNSON, co-trustees; JOHNSON INTERNATIONAL INC.; THE RANCH AT SOUTH FORK, L.L.C.; GENERAL HUNT PROPERTIES, INC.; ATLAS SOUTHWEST, INC.; KARL ANDREW WOEHLECKE and LISA WOEHLECKE, husband and wife; JOHN DOE and JANE DOES, husbands and wives, 1 through 10; ABC CORPORATIONS, 1 through 10,

Defendants.

NO. CV 2005-002692

GEORGE H. JOHNSON AND JANA JOHNSON'S MOTION TO DISMISS AND MEMORANDUM OF LAW IN SUPPORT

(Non-Classified Civil-Complex)

(Assigned to the Honorable Rebecca A. Albrecht)

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MOTION

Pursuant to Rule 12(b)(6), Ariz. R. Civ. P., defendants George H. Johnson and Jana Johnson (collectively the "Johnsons") move to dismiss plaintiffs' complaint against them because the complaint fails to state a claim against them individually. The Johnsons are either owners, directors, officers, trustees, or managers of the various entity defendants (which are comprised of three corporations, one trust and one limited liability company). Although plaintiffs' complaint alleges that the Johnsons are related to the various entities, it does provide any allegation sufficient to disregard the separate legal entities and subject the Johnsons to personal liability. Indeed, there are no substantive allegations against the Johnsons individually. Because plaintiffs have not alleged anything that would subject the Johnsons to individual liability, the Court should dismiss all claims against the Johnsons for failure to state a claim. This motion is supported by the following Memorandum of Law.

MEMORANDUM OF LAW

I. Factual Background

Plaintiffs filed suit on February 14, 2005 alleging numerous causes of action including common law trespass, breach of a state grazing lease, statutory trespass, violations of Arizona's native plant law on state and private lands, various water quality and storm water discharge violations on private property and state trust lands, unlawful killing of bighorn sheep, and the negligent destruction of wildlife. In essence, plaintiffs contend that the various legal entities named as defendants: (1) conducted unauthorized grading and clearing of various lands; and (2) allowed goats to escape from property owned by the entity defendants (which allegedly later infected bighorn sheep with an illness).

In the complaint, plaintiffs name two sets of individuals, a trust, a limited

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liability company and three corporations as defendants, including: (1) the Johnsons; (2) Karl Andrew Woehlecke and Lisa Woehlecke; (3) The George H. Johnson Revocable Trust, and George H. Johnson and Jana Johnson, co-trustees; (4) The Ranch At South Fork, L.L.C.; (5) Johnson International, Inc.; (6) General Hunt Properties, Inc.; and (7) Atlas Southwest, Inc. In a complaint that spans twenty-nine pages and one hundred and twenty-three paragraphs, however, plaintiffs rarely mention the individual defendants at all. Indeed, George and Jana Johnson are only mentioned in eight paragraphs of the complaint and none of the allegations is substantive. See Complaint at ¶¶ 6-11, 13 and 15. The sole allegations relating to the Johnsons are that:

- The Johnsons are husband and wife, acted on behalf of their marital community and, "*on information and belief*," George Johnson "directed, approved or acquiesced in many of the acts and omissions complained of herein." See Complaint at ¶ 6 (emphasis added);
- George and Jana Johnson are the co-trustees and beneficiaries of defendant Johnson Trust and, as such, are liable for its actions. See Complaint at ¶ 7;
- George Johnson is President, Jana Johnson is Vice President and the Johnsons are directors of defendant General Hunt, Inc. See Complaint at ¶ 8;
- George Johnson managed the South Fork Property at issue in one of the claims. See Complaint at ¶ 9;
- George Johnson is President/Treasurer and Jana Johnson is Vice President/Secretary of defendant Johnson International, Inc. See Complaint at ¶ 10;
- George Johnson is President/Treasurer and Jana S. Johnson is Vice President/Secretary of defendant Atlas Southwest, Inc. See Complaint at ¶ 11;
- The Johnsons or the other defendants were either owners of, or involved in, the properties at issue. See Complaint at ¶ 13; and
- The Johnsons are real estate developers that "directly or indirectly own or control" the various entity defendants. See Complaint at ¶ 15.

There are no allegations against the Johnsons claiming that they individually did

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any of the acts alleged in the complaint. Because there are no allegations that, if true, would give rise to individual and personal liability, the Court should dismiss all claims against them.

II. Legal Analysis

A. The Johnsons are not proper parties solely because they own or are involved with the legal entities that are named defendants.

There are no allegations that the Johnsons did anything to subject them to personal liability. Rather, plaintiffs have named the Johnsons as individual defendants simply because they have ownership interests in or serve as officers, directors, trustees, or managers of the various legal entities that are defendants. Arizona has made it clear in statutes and case law, however, that in all forms of legal entities, courts do not disregard the legal form simply because an individual is a member, manager, officer, director or trustee. Plaintiffs attempt to name the Johnsons is improper.

i. The Johnsons are not proper parties simply because they are members or managers of a limited liability company that is a defendant.

The Arizona Limited Liability Company Act specifically defines who is liable for the actions of a limited liability company. See A.R.S. §§ 29-601, et seq. A member, manager, employee, officer, or agent of a limited liability company is not liable for the obligations or tort liabilities of the limited liability company solely by reason of being a member, manager, employee, officer, or agent of the limited liability company. See A.R.S. § 29-651.[1] Likewise, a member of a limited liability company is not a proper

[1] A.R.S. § 29-651 states:

> Except as provided in this chapter, a member, manager, employee, officer or agent of a limited liability company is not liable, solely by reason of being a member, manager, employee, officer or agent, for the debts, obligations and liabilities of the limited liability company whether arising in contract or tort, under a judgment, decree or order of a court or otherwise.

party in a lawsuit against the limited liability company simply by reason of being a member. See A.R.S. § 29-656.[2]

In this case, because The Ranch at Southfork, L.L.C. is a limited liability company, the limited liability company is required by law to have a managing member. Although plaintiffs have alleged that George Johnson is the managing member of the limited liability company, he does not actively manage the property at issue and plaintiffs have not alleged anything other than his capacity as managing member of the limited liability company to subject the Johnsons to personal liability. Pursuant to the Arizona Limited Liability Company Act, therefore, the Johnsons are not personally liable for the alleged actions of The Ranch at Southfork, L.L.C.

ii. The Johnsons are not proper parties simply because they are trustees of a trust that is a defendant.

Contrary to plaintiffs' erroneous legal assertion that the Johnsons are "personally liable as trustees for all the acts and omissions of the Johnson Trust complained of [in the complaint]," Arizona law makes it clear that trustees are not personally liable for acts of a trust simply for being a trustee. A.R.S. § 14-7307 states that a trustee is not liable for the actions or torts of a trust unless there are facts to show personal liability:

> A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate *only if he is personally at fault.*

A.R.S. § 14-7307(B) (emphasis added).

In this case, the only allegations relating to the Johnsons are that they are the co-trustees of the George H. Johnson Revocable Trust, another defendant in the litigation.

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[2] A.R.S. § 29-656 states:

> A member of a limited liability company, solely by reason of being a member, is not a proper party to proceedings by or against a limited liability company unless the object is to enforce a member's right against or liability to the limited liability company or except as provided in this chapter.

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Plaintiffs have not alleged anything else other than their erroneous legal conclusion that the Johnsons are personally liable because they are trustees. Pursuant to A.R.S. § 14-7307(B), therefore, the Johnsons are not personally liable for the alleged actions of the George H. Johnson Revocable Trust.

iii. The Johnsons are not proper parties simply because they are officers or directors of a corporation that is a defendant.

It is well established that a corporate structure is a separate legal entity that has the legitimate purpose of insulating individuals from personal liability for acts done on behalf of the corporation. See Malisewski v. Singer, 123 Ariz. 195, 196, 598 P.2d 1014, 1015 (App. 1979) (citing Dietel v. Day, 16 Ariz.App. 206, 492 P.2d 455 (1972)). It has always been the law in Arizona that when a corporation is legally created and authorized to do business on its own, officers, shareholders and directors are not personally liable for corporate liabilities. See Employer's Liability Assurance Corporation v. Lunt, 82 Ariz. 320, 313 P.2d 393 (1957).

In this case, the only allegations relating to the Johnsons are that: (1) the Johnsons are directors of defendant General Hunt, Inc. and George Johnson is President and Jana Johnson is Vice President; (2) George Johnson is President/Treasurer and Jana Johnson is Vice President/Secretary of defendant Johnson International, Inc.; and (3) George Johnson is President/Treasurer and Jana S. Johnson is Vice President/Secretary of defendant Atlas Southwest, Inc. Plaintiffs have not alleged anything else to support individual liability for the alleged acts of the corporations. Under the well-established case law in Arizona, the Johnsons are not personally liable for the alleged actions of General Hunt, Inc.; Johnson International, Inc.; or Atlas Southwest, Inc.

. . .

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B. Plaintiffs have not alleged any basis to disregard the legal entities and impose individual liability.

The rule in Arizona is that courts will not lightly disregard the separate status of legal entities and the party seeking to impose individual liability carries a heavy burden. See Chapman v. Field, 124 Ariz. 100, 102, 602 P.2d 481, 483 (1979); Keams v. Tempe Technical Institute, Inc., 993 F. Supp. 714 (D. Ariz. 1997). In order to pierce the corporate entity and attach personal liability to a corporation's officers, shareholders or directors, at a minimum, plaintiffs must prove that observance of the corporate form would promote injustice (Cammon Consultants Corp. v. Day, 181 Ariz. 231, 889 P.2d 24 (App. 1994)); to observe the corporate form would result in an injustice (Gatecliff v. Great Republic Life Insurance Company, 170 Ariz. 34, 821 P.2d 725 (1991)); or that the corporation is undercapitalized and is only a sham (Keams, 993 F. Supp. at 714).

In this case, plaintiffs do not make any of those allegations. There is no allegation that the legal entities are the alter egos of the Johnsons, that the legal entities are inadequately capitalized or that recognition of the legal entities would promote an injustice or fraud on the system. Nowhere in plaintiffs' complaint is there any allegation to support disregarding the separate legal entities and imposing personal liability on the Johnsons. Plaintiffs do not provide any factual basis for including the individual defendants at all.

Indeed, the only allegation relating to the Johnsons that states anything other than their status as officer, manager, director or trustee is one sentence in paragraph 6 of the complaint that states: "*Upon information and belief,* Defendant George H. Johnson directed, approved or acquiesced in many of the acts and omissions complained of herein." See Complaint at ¶ 6 (emphasis added). As an initial matter, on its face, the allegation shows that there is no factual basis for such an assertion at this time because it is only made "upon information and belief." Secondly, the allegation only asserts a generic and unspecified "many of the acts and omissions" that George Johnson allegedly directed,

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approved or acquiesced in. It is clear from the qualifications on the allegation (and the lack of any substantive allegations against the Johnsons) that there is nothing to support that unwarranted conclusion. In such a case, even though well-pleaded material allegations of the complaint are deemed true in ruling on a motion to dismiss, the Court should not consider plaintiffs' unwarranted allegations containing conclusions of law or unwarranted deductions of fact. See Aldabbagh v. Arizona Dept. of Liquor Licenses and Control, 162 Ariz. 415, 417-18, 783 P.2d 1207, 1209-10 (App. 1989). If, during the course of the litigation, plaintiffs develop facts to state a claim against the individuals, they should then seek leave of the court to amend their complaint to assert such a claim. In the meantime, however, it is improper for plaintiffs to generically assert an unsubstantiated and conclusory allegation "upon information and belief" in an effort to circumvent the clear Arizona law stating that the Johnsons are not individually liable.

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III. Conclusion

For the foregoing reasons, George Johnson and Jana Johnson respectfully request that the Court dismiss all claims against them individually for failure to state a claim.

RESPECTFULLY SUBMITTED this 23rd day of May, 2005.

JONES, SKELTON & HOCHULI, P.L.C.

By__/s/ Chris Stuart_____
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ORIGINAL e-filed and served
this 23rd day of May, 2005, to:

The Honorable Rebecca A. Albrecht
101 West Jefferson, ECB 411
Phoenix, Arizona 85003

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

STATE OF ARIZONA, ex rel., STEPHEN A. OWENS, Director, Arizona Department of Environmental Quality; MARK WINKLEMAN, Commissioner, Arizona State Land Department; ARIZONA GAME AND FISH COMMISSION; DONALD BUTLER, Director, Arizona Department of Agriculture; ARIZONA BOARD OF REGENTS, on behalf of the Arizona State Museum,

Plaintiffs,

v.

GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife; THE GEORGE H. JOHNSON REVOCABLE TRUST, and GEORGE H. JOHNSON and JANA JOHNSON, co-trustees; JOHNSON INTERNATIONAL INC.; THE RANCH AT SOUTH FORK, L.L.C.; GENERAL HUNT PROPERTIES, INC.; ATLAS SOUTHWEST, INC.; KARL ANDREW WOEHLECKE and LISA WOEHLECKE, husband and wife; JOHN DOE and JANE DOES, husbands and wives, 1 through 10; ABC CORPORATIONS, 1 through 10,

Defendants.

NO. CV 2005-002692

DEFENDANTS GEORGE H. JOHNSON AND JANA S. JOHNSON; GEORGE H. JOHNSON REVOCABLE TRUST; GEORGE H. JOHNSON AND JANA JOHNSON, CO-TRUSTEES; JOHNSON INTERNATIONAL, INC.; THE RANCH AT SOUTH FORK, L.L.C.; GENERAL HUNT PROPERTIES, INC.; AND ATLAS SOUTHWEST, INC.'S MOTION TO DISMISS CAUSE EIGHT OF PLAINTIFFS' COMPLAINT (NEGLIGENCE PER SE)

(Non-Classified Civil-Complex)

(Assigned to the Honorable Rebecca A. Albrecht)

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MOTION

Pursuant to Rule 12(b)(6), Arizona Rules of Civil Procedure, George H. Johnson and Jana S. Johnson; The George H. Johnson Revocable Trust, George H. Johnson and Jana Johnson, co-trustees; Johnson International, Inc.; The Ranch At South Fork, L.L.C.; General Hunt Properties, Inc.; and Atlas Southwest, Inc. (collectively "Defendants") hereby move to dismiss Plaintiffs' eighth cause of action (titled "Wrongful Destruction of Wildlife—Negligence per se") for failure to state a claim. *See* First Amended Complaint at ¶¶ 105-114 (pp. 24-25).

For their eighth cause of action, Plaintiffs allege that Defendants are negligent per se for allegedly causing the death of bighorn sheep after allegedly violating A.R.S. §§ 37-501 and 37-502 and 43 C.F.R. § 4140.1(a)(1). Plaintiffs fail to state a claim for negligence per se under the state statutes because the alleged harm resulting from Defendants' alleged actions is not the type of harm meant to be addressed by the statutes. In short, the purpose of the state statutes is to guard against the removal of natural products (such as timber, forage (grass), oil and gas, minerals, etc.) from public lands, not the "wrongful destruction of wildlife" as alleged in the First Amended Complaint. Because the purpose of the state statutes is not to protect wildlife (namely bighorn sheep), Plaintiffs cannot use an alleged violation of those statutes to support a negligence per se claim for alleged deaths of bighorn sheep.

Plaintiffs fail to state a claim for negligence per se under 43 C.F.R. § 4140.1(a)(1) for several reasons. First, Plaintiffs are attempting to apply federal law to establish a standard of care in a state negligence action. Second, the authority relied upon by Plaintiffs is not a statute passed by Congress, but rather a regulation adopted by an agency. Finally, the regulation Plaintiffs rely upon only establishes the possibility of civil penalties for violating terms and conditions in a Bureau of Land Management grazing lease. The

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regulation does not establish a general standard of care that would form the basis for a claim of negligence per se relating to the alleged communication of disease from domestic goats to bighorn sheep.

Plaintiffs cannot state a claim for negligence per se under either the state statutes or the Bureau of Land Management's regulation. Accordingly, the Court should dismiss Plaintiffs eighth cause of action.[1] This motion is supported by the following memorandum of points and authorities and by the factual allegations appearing in Plaintiffs' First Amended Complaint and the exhibits attached thereto.

MEMORANDUM OF POINTS AND AUTHORITIES

I. Factual Background

For their eighth cause of action ("Wrongful Destruction of Wildlife—Negligence per se"), Plaintiffs allege that in November 2003, Defendants failed to control or restrain a goat herd existing on Defendants' property, and that many of the goats escaped from Defendants' property and made their way to the Silver Bell Mountains where a herd of bighorn sheep are located. *See* First Amended Complaint at ¶ 45. Plaintiffs allege that after the goats escaped, they trespassed over state trust lands and federal lands to reach the Silver Bell Mountains. *Id.* at ¶ 106.

Plaintiffs allege that the goats and the bighorn sheep "commingled," and that the goats communicated infectious keratoconjunctivitis (commonly known as "pink eye") and/or contagious ecthyma (a severe skin rash) to numerous sheep. *Id.* at ¶ 45. Plaintiffs contend that as a result, at least 21 sheep died from causes relating to visual impairment, including "malnutrition, falling from steep terrain, or the inability to evade predators." *Id.* at ¶ 49.

[1] This motion does not address Plaintiffs' common law negligence claim (Plaintiffs' ninth cause of action), but rather merely seeks dismissal of the negligence per se claim.

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Plaintiffs contend that because the goats allegedly escaped and crossed over state and federal lands, Defendants violated two statutes – A.R.S. § 37-501[2] and 43 C.F.R. § 4140.1(a)(1).[3] Plaintiffs contend that because Defendants allegedly violated those two statutes, Defendants are liable for negligence per se for the death of the bighorn sheep.

II. Legal Analysis

A. Plaintiffs cannot use A.R.S. § 37-501 to establish a standard of care for negligence per se in their claim relating to "Wrongful Destruction of Wildlife."

Plaintiffs rely on one state statute, A.R.S. § 37-501, as the basis for their negligence per se action relating to the alleged "Wrongful Destruction of Wildlife." Plaintiffs' attempt to base a negligence per se claim on that statute fails, however, because the express intent of the statute is to provide a remedy for the wrongful removal of natural products (such as timber, forage for livestock, oil and gas, valuable minerals, etc.) from state land – not the alleged wrongful destruction of wildlife.

Arizona courts have adopted the Restatement (Second) of Torts (1965) on the issue of negligence per se. *See Tellez v. Saban*, 188 Ariz. 165, 169, 933 P.2d 1233, 1237

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[2] A.R.S. § 37-501 states:

A person is guilty of a class 2 misdemeanor who:

1. Knowingly commits a trespass upon state lands, either by cutting down or destroying timber or wood standing or growing thereon, by carrying away timber or wood therefrom, or by grazing livestock thereon, unless he has a lease or sublease approved by the department for the area being grazed.
2. Knowingly extracts or removes oil, gas, coal, mineral, earth, rock, fertilizer or fossils of any kind or description therefrom.
3. Knowingly without right injures or removes any building, fence or improvements on state lands, or unlawfully occupies, plows or cultivates any of the lands.
4. With criminal negligence exposes growing trees, shrubs, or undergrowth standing on state lands to danger or destruction by fire.

[3] 43 C.F.R. § 4140.1(a)(1) states:

The following acts are prohibited on public lands and other lands administered by the Bureau of Land Management:

(a) Grazing permittees or lessees performing the following prohibited acts may be subject to civil penalties under § 4170.1:

(1) Violating special terms and conditions incorporated in permits or leases[.]

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(App. 1996). Under the doctrine of negligence per se, a standard of care mandated by statute preempts the traditional common law negligence inquiry as to whether a defendant's actions were reasonable. *See id.* (citing Restatement (Second) of Torts ("Restatement") § 286 (1965)). Accordingly, if the law imposes a standard of care, failing to meet that standard makes it unnecessary to determine the reasonableness of a defendant's actions, and a defendant violating that standard of care is negligent per se.[4] *See id.*

Few statutes establish a "standard of care" that triggers negligence per se. *See id.* To establish a "standard of care" triggering the doctrine of negligence per se, the statute must be intended to protect the specific class of persons involved from the specific harm at issue in the negligence per se claim:

> A court may adopt a statute as the relevant standard of care if it first determines that the statute's purpose is in part to protect a class of persons that includes the plaintiff and the specific harm that occurred and against the particular action that caused the harm.

Id. (citing Restatement § 286). If the statute at issue was not intended to protect the plaintiff or to protect against the type of harm alleged by plaintiff, the statute does not establish a standard of care for negligence per se purposes and the plaintiff must rely on traditional negligence theories to state a claim. *See id.* (upholding dismissal of negligence per se claim because statute was not intended to protect plaintiff and therefore did not create a standard of care); *see also* Restatement § 288.

Because Plaintiffs' negligence per se claim in this case is based on the alleged wrongful destruction of bighorn sheep by a disease allegedly communicated by trespassing goats, to state a claim for negligence per se under A.R.S. § 37-501, Plaintiffs must be able to illustrate that the statute was intended to preclude that specific harm. A simple review of A.R.S. § 37-501, however, illustrates that it does *not* address wildlife

[4] Before liability attaches, however, Plaintiffs must still prove the remaining elements of a negligence claim, including proximate cause and damages. *See id.*

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at all, let alone the alleged communication of a disease to wildlife by domestic livestock. Indeed, A.R.S. § 37-501 specifically lists the type of harm it is designed to protect:

- "cutting down or destroying timber or wood standing or growing [on state land]. . . ." *See* A.R.S. § 37-501(1)
- "carrying away timber or wood [from state land], by mowing, cutting or removing hay or grass [from state land], or by grazing livestock . . . ." *See* A.R.S. § 37-501(1);
- knowingly extracting or removing "oil, gas, coal, mineral, earth, rock, fertilizer or fossils" from state land. *See* A.R.S. § 37-501(2);
- knowingly removing or damaging any "building, fence or improvements" on state land. *See* A.R.S. § 37-501(3);
- unlawfully occupying, plowing or cultivating state land. *See* A.R.S. § 37-501(3);
- exposing "growing trees, shrubs or undergrowth standing on state lands to danger or destruction by fire" with criminal negligence. *See* A.R.S. § 37-501(4).

Despite specifically listing timber, wood, hay, grass, oil, gas, coal, minerals, earth, rock, fertilizer, fossils, buildings, fences, improvements, trees, shrubs and undergrowth, there is no mention of injuries to wild animals. *See* A.R.S. § 37-501. It is well established in Arizona that a statute's expression of specific items indicates legislative intent to exclude unexpressed items. *See Estate of Hernandez v. Arizona Board of Regents*, 177 Ariz. 244, 249, 866 P.2d 1330, 1335 (1994). Accordingly, it is clear that the statute was not intended to protect against alleged harm to wildlife, especially from diseases communicated by domestic animals.

Because the statute was not intended to protect wildlife from diseases that could be communicated from trespassing domestic animals, even if Defendants violated the statute, Plaintiffs cannot state a negligence per se claim using A.R.S. § 37-501. The Restatement's illustration shows the defect in Plaintiffs' claim:

> A statute, which requires that vessels transporting animals across the ocean shall pen them separately, is construed

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> to be intended only to prevent sickness resulting from contagion by close contact. A ships sheep by B's ship. His sheep are not separately penned, but are herded together with other animals on the upper deck. As a result, some of A's sheep catch a disease from other animals, and others are washed overboard by a storm. The statute establishes a standard of conduct as to the infected sheep, but not as to those washed overboard.

Restatement § 286, Illustration 4. In this case, A.R.S. § 37-501 does not even mention wildlife, and there is no indication that it was intended to protect wildlife from diseases communicated by trespassing domestic animals. As with the Restatement's illustration, because A.R.S. § 37-501 was not intended to protect against the harm alleged by Plaintiffs, they cannot base a negligence per se claim on A.R.S. § 37-501.

Plaintiffs also cite A.R.S. § 37-502 as an alleged basis for their negligence per se claim. First Amended Complaint at ¶¶ 107 and 110. That statute, however, merely provides civil remedies for violations of A.R.S. § 37-501. It does not establish any independent standard of conduct. Moreover, when read in conjunction with A.R.S. § 37-501, A.R.S. § 37-502 supports dismissal. Subpart A of the statute provides that a person who "commits any trespass upon state lands as defined by section 37-501 is also liable in a civil action . . . for three times the amount of the damage caused by the trespass, if the trespass was willful, but for single damages only if casual or involuntary." Subpart C of A.R.S. § 37-502 provides that the "damage provided for in this section is the rate per acre as determined for the year for the appraised *carrying capacity* of the lands" (emphasis supplied). In other words, damages are based on the *grazing fee* that should have been paid had the trespasser properly leased the state land. Additionally, subpart D allows the State Land Department to "seize and take any product or property unlawfully severed from the land" and to "dispose of the product or property so seized in the manner prescribed by law for disposing of products of state lands." This statutory remedy contemplates the removal of timber, minerals or other products, and is inconsistent with

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the use of the statute to establish a general standard of care with regard to a domestic livestock operation.

B. Plaintiffs cannot use 43 C.F.R. § 4140.1(a)(1) to establish a standard of care for negligence per se in their claim relating to "Wrongful Destruction of Wildlife."

Plaintiffs' attempt to base a negligence per se claim on 43 C.F.R. § 4140.1(a)(1) is even more attenuated than their reliance on the state statute. First, Plaintiffs are attempting to apply a federal regulation to establish a standard of care for a state tort claim. Second, the regulation relied upon by Plaintiffs is not a statute enacted by Congress, but rather a regulation adopted by a federal agency. Although some courts have used administrative regulations to establish a standard of care for negligence per se in certain circumstances, administrative regulations are not the preferred source of a negligence per se standard of care and courts are more hesitant to rely on them for such a purpose. *See* Restatement § 286, cmt. d ("The courts have tended to adopt administrative standards less frequently than legislative enactments.").

Perhaps most importantly, 43 C.F.R. § 4140.1(a)(1) does not prescribe any standard of conduct, was not intended to address the type of harm alleged in this case and was not intended to protect state agencies (the Plaintiffs in this case). As discussed above, because Plaintiffs' negligence per se claim is based on the alleged wrongful destruction of bighorn sheep by a disease allegedly communicated by trespassing goats, to state a claim for negligence per se under 43 C.F.R. § 4140.1(a)(1), Plaintiffs must be able to show that the statute was intended to preclude that specific harm and was intended to protect state agencies. *See Tellez* at 169, 933 P.2d at 1237; Restatement §§ 286 and 288. 43 C.F.R. § 4140.1(a)(1) does not mandate any particular standard of conduct, let alone a specific standard of conduct to protect against the harm alleged in this case. The regulation simply states that a grazing lessee *may be* subject to civil penalties if she

violates a special term or condition included in a Bureau of Land Management grazing lease. *See* 43 C.F.R. § 4140.1(a)(1). In addition, because the regulation relates to the Bureau of Land Management grazing leases, the statute was intended to protect federal lands administered by the Bureau of Land Management – not state agencies and state lands. For that reason alone, Plaintiffs fail to state a claim for negligence per se. *See Tellez* at 169, 933 P.2d at 1237 (upholding dismissal of negligence per se claim because statute was not intended to protect plaintiff).

In an effort to circumvent the requirement that a statute must specifically seek to prevent the alleged harm to state a claim for negligence per se, Plaintiffs allege that the Defendants' Bureau of Land Management leases contain a sentence which states: "To protect desert bighorn sheep: no domestic sheep or goat grazing will be authorized on public lands within 9 miles surrounding desert bighorn sheep habitat." *See* First Amended Complaint at ¶ 109; Exhibits B and C to First Amended Complaint. Plaintiffs' attempt to rely on that sentence for a negligence per se claim fails, however, because the language is merely a contractual obligation – not a standard of conduct established by the legislature.

Significantly, although that language is contained in the Bureau of Land Management leases, which were attached to the Complaint, this sentence is *not* found in 43 C.F.R. § 4140.1(a)(1), or in any other Bureau of Land Management regulation. Moreover, there is *no* such condition or other prohibition applicable to domestic goats in the State Land Department's grazing leases. *See* Exhibit A to First Amended Complaint. Thus, the grazing leases issued by the State itself conflict with the federal lease, and undermine the use of the latter to establish a general standard of care under state law.

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Further, Plaintiffs are not a party to the Bureau of Land Management leases and certainly do not have any rights under the leases. Allowing a plaintiff to assert a negligence per se action based on a contractual obligation (rather than a statutory standard of care) is already once removed from the requirements of negligence per se. Allowing a plaintiff that was not even a party to that contract to assert the negligence per se action would be twice removed.

In sum, Plaintiffs cannot show that 43 C.F.R. § 4140.1(a)(1) establishes a standard of conduct, was intended to protect *state* agencies *and* was intended to protect against the harm alleged in this case. Reliance on language contained in the Bureau of Land Management leases is futile because those leases only establish a contractual obligation (rather than a statutory standard of care), Plaintiffs were not parties to those leases and Plaintiffs' own grazing lease does not contain any such language. Therefore, as a matter of law, Plaintiffs cannot assert a negligence per se claim under 43 C.F.R. § 4140.1(a)(1).

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III. Conclusion

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' eighth cause of action (titled "Wrongful Destruction of Wildlife—Negligence per se") for failure to state a claim.

RESPECTFULLY SUBMITTED this 23rd day of May, 2005.

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

STATE OF ARIZONA, ex rel., STEPHEN A. OWENS, Director, Arizona Department of Environmental Quality; MARK WINKLEMAN, Commissioner, Arizona State Land Department; ARIZONA GAME AND FISH COMMISSION; DONALD BUTLER, Director, Arizona Department of Agriculture; ARIZONA BOARD OF REGENTS, on behalf of the Arizona State Museum,

Plaintiffs,

v.

GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife; THE GEORGE H. JOHNSON REVOCABLE TRUST, and GEORGE H. JOHNSON and JANA JOHNSON, co-trustees; JOHNSON INTERNATIONAL INC.; THE RANCH AT SOUTH FORK, L.L.C.; GENERAL HUNT PROPERTIES, INC.; ATLAS SOUTHWEST, INC.; KARL ANDREW WOEHLECKE and LISA WOEHLECKE, husband and wife; JOHN DOE and JANE DOES, husbands and wives, 1 through 10; ABC CORPORATIONS, 1 through 10,

Defendants.

NO. CV 2005-002692

DEFENDANTS GEORGE H. JOHNSON AND JANA S. JOHNSON; GEORGE H. JOHNSON REVOCABLE TRUST; GEORGE H. JOHNSON AND JANA JOHNSON, CO-TRUSTEES; JOHNSON INTERNATIONAL, INC.; THE RANCH AT SOUTH FORK, L.L.C.; GENERAL HUNT PROPERTIES, INC.; AND ATLAS SOUTHWEST, INC. MOTION TO DISMISS CAUSE SEVEN OF PLAINTIFFS' COMPLAINT

(Non-Classified Civil-Complex)

(Assigned to the Honorable Rebecca A. Albrecht)

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Pursuant to Rule 12(b)(6) of the Arizona Rules of Civil Procedure, George H. Johnson and Jana S. Johnson; The George H. Johnson Revocable Trust, George H. Johnson and Jana Johnson, co-trustees; Johnson International, Inc.; The Ranch At South Fork, L.L.C.; General Hunt Properties, Inc.; and Atlas Southwest, Inc. (collectively "Defendants") hereby move this Court to dismiss the seventh cause of action in Plaintiffs' Complaint. *See* First Amended Complaint at ¶¶ 99-104 (p. 23).[1]

For their seventh cause of action, Plaintiffs allege that domestic goats escaped from their range and "commingled" with bighorn sheep located in the Silver Bell Mountains, northwest of Tucson. *Id.* at ¶¶ 45 and 100. Plaintiffs further allege that Defendants' livestock transmitted a bacterial infection to the members of the herd causing the death of at least 21 sheep. *Id.* at ¶¶ 46 and 100. Plaintiffs argue that the death of the sheep constitutes an unlawful killing of wildlife under A.R.S. § 17-301, *et seq.*, which governs the taking and handling of wildlife. *Id.* at ¶ 102. As a matter of law, however, these laws are intended to cover only activity that is purposively directed at "taking" wildlife (e.g., hunting, trapping and capturing animals). The death of animals indirectly caused by ordinary land use activities, such as farming and ranching, does not violate state wildlife laws.

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL STANDARD

Motions to dismiss should be granted when a plaintiff is not entitled to relief under any state of facts susceptible of proof in the stated claim. *Sun World Corp. v. Pennysaver, Inc.*, 130 Ariz. 585, 586, 637 P.2d 1088, 1089 (App. 1981). In considering a motion to dismiss, all material allegations in a complaint are taken as true and read

[1] In their Complaint, Plaintiffs have named as defendants a number of individuals and entities without attempting to identify which defendant is responsible for what action. For the purposes of this motion, which is based on whether Arizona wildlife laws apply to the alleged activities, it is not necessary to identify any individual defendants.

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in a light most favorable to a plaintiff. *Logan v. Forever Living Products International, Inc.*, 203 Ariz. 191, 192, 52 P.3d 760, 761 (2002). However, allegations that are mere conclusions of law are not considered. *Aldabbagh v. Arizona Dept. of Liquor Licenses*, 162 Ariz. 415, 417, 783 P.2d 1207, 1209 (App. 1989).

II. FACTS ALLEGED

For their seventh cause of action, brought by the State of Arizona on behalf of the Arizona Game and Fish Commission (the "Commission"), Plaintiffs allege that on or around February 2003, General Hunt Properties, Inc. ("General Hunt"), purchased a large ranch in Pinal County Arizona known as the La Osa Ranch. Compl. at ¶ 16. Plaintiffs allege that Defendants authorized the grazing of domestic goats on the La Osa Range. *Id.* at ¶ 39. Plaintiffs allege that in November 2003, Defendants failed to control or restrain the goat herd, and that many of the goats escaped from the La Osa Range and made their way to the Silver Bell Mountains where a herd of bighorn sheep are located. *Id.* at ¶ 45. Plaintiffs allege that the domestic goats and the bighorn sheep "commingled," and that the goats communicated infectious keratoconjunctivitis (commonly known as "pink eye") and/or contagious ecthyma (a severe skin rash) to numerous sheep. *Id.* at ¶¶ 45 and 46. As a result, Plaintiffs allege, at least 21 sheep died from causes relating to visual impairment, including "malnutrition, falling from steep terrain, or the inability to evade predators." *Id.* at ¶ 49.

Accepting the foregoing factual allegations as true for the purpose of this motion, Plaintiffs' seventh cause of action fails as a matter of law because Arizona's wildlife laws simply do not apply to the death of wildlife indirectly caused by the transmission of disease from domestic livestock that escape from a ranch.

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III. LEGAL ANALYSIS

A. Introduction.

Plaintiffs contend that the killing of any wild animal is "unlawful, when not expressly permitted by law." Complaint at ¶ 99. According to Plaintiffs, therefore, any activity, *regardless of the activity's nature or the intent of the actor*, that results in the killing of wildlife is a violation of Arizona law. Under Plaintiffs' theory, for example, the following activities would be illegal

> A Phoenix homeowner allows her cat to go outside, and the cat kills a mourning dove in her backyard.
>
> A family is camping in a national forest near Prescott, and embers are blown from their campfire, causing a fire that destroys a grove of trees occupied by squirrels before it is contained.
>
> A north Scottsdale resident, living near the McDowell Mountains, runs over a bull snake that had coiled up under the back tire of his vehicle overnight.
>
> An irrigation district in central Arizona drains its canal to remove silt and debris, causing a number of catfish and carp to become stranded and die.

There is simply no basis for Plaintiffs' extraordinarily broad interpretation of the applicable statutes, under which each of the foregoing incidents would be illegal. As explained below, Arizona wildlife law prohibits activities that "take" wildlife, and the definition of the term "take," as well as the statutory scheme codified in Title 17 generally, limits the application of Arizona wildlife law to hunting, fishing or capturing wildlife, i.e., actions purposively directed at wild animals.

B. Definition of "Take."

Pursuant to A.R.S. § 17-102, wildlife is the property of the state and "may be *taken* at such times, in such places, in such manner and with such devices as provided by law or rule of the commission" (emphasis supplied). The term "wildlife" is defined

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very broadly as "all wild mammals, wild birds and the nests or eggs thereof, reptiles, amphibians, mollusks, crustaceans, and fish, including their eggs or spawn." A.R.S. § 17-101 (A)(22). Thus, for example, various species of common birds, snakes, and fish are "wildlife," in addition to game animals such as deer, javelina and bighorn sheep.

As defined by statute, the "*taking*" of wildlife involves purposeful activities directed at individual animals:

> "Take" means pursuing, shooting, hunting, fishing, trapping, killing, capturing, snaring or netting of wildlife or the placing or using of any net or other device or trap in a manner that may result in the capturing or killing of wildlife.

A.R.S. § 17-101 (A)(18).

Notably, the term "take" was defined by the legislature in the initial version of Arizona's wildlife laws, and that definition is remarkably similar to the current definition of the term. Specifically, "take" was defined as the "pursuit, hunting, capture, or *killing* of birds, animals, or fish, or collection of birds' nests or eggs, or spawn or eggs of fish and shall include pursuing, shooting, hunting, *killing*, capturing, taking, snaring, netting and all lesser acts, such as disturbing or annoying, or placing or using any net or other device." Laws 1929, Ch. 84, § 37 (emphasis supplied). In 1929, Arizona was a rural state whose economy was based on farming, ranching and other agriculture activities. It is unlikely that the legislature, in enacting the first comprehensive set of statutes regulating activities that "take" wildlife, intended to criminalize all activities that result in the death of birds, animals and fish, as Plaintiffs' claim suggests.[2]

B. Plaintiffs' Claim is Inconsistent with the Definition of "Take."

Plaintiffs' interpretation is contrary to the plain language of the statutory definition of the term "take," quoted above. This definition contains a series of verbs, the common

[2] The State of Arizona is reported to have had a population of 435,573 persons in 1930, of which 66% resided in rural areas. *Arizona Statistical Abstract 2003* 25 (6th ed. 2003)

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meaning of which connote actions specifically directed at killing or capturing wild animals or fish, i.e., "pursuing," "shooting," "hunting," fishing," "trapping," "capturing," "snaring" and "netting" wildlife. In this context, the meaning of the word "killing" is limited to similar types of purposive conduct. "[G]eneral words which follow the enumerations of particular persons of things should be interpreted as applicable only to persons or things of the same general nature or class." *Davis v. Hidden*, 124 Ariz. 546, 549, 606 P.2d 36, 39 (1979), *citing Yauch v. State*, 109 Ariz. 576 (1973), *and City of Phoenix v. Yates*, 69 Ariz. 68, 208 P.2d 1147 (1949).

Here, it is apparent that the legislature's use of the word "killing" in defining "take" was not intended to expand the definition to criminalize ordinary activities that may result in the death of a wild animal, but instead to reinforce the remaining specifically identified activities. A contrary interpretation would render much of the "take" definition superfluous. A statute should be interpreted "whenever possible, so no clause, sentence or word is rendered superfluous, void, contradictory, or insignificant." *Samsel v. Allstate Insurance Co.*, 199 Ariz. 480, 483, 19 P.3d 621, 624 (App. 2001), *quoting Continental Bank v. Arizona Dep't of Revenue*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

C. Plaintiffs' Claim is Inconsistent with Arizona's Statutory Scheme Regulating Wildlife "Takings."

Plaintiffs' interpretation is also contrary to the general statutory scheme in Title 17, which contains an entire chapter devoted to regulating activities that "take" wildlife. *See* A.R.S. § 17-301 through 17-373. For example, A.R.S. § 17-301 provides a comprehensive list of restrictions and regulations, including the times when, and methods by which, wildlife may be taken. Other statutes regulate hunting and shooting (e.g., A.R.S. §§ 17-304 and 17-305), interference with the rights of hunters (A.R.S. §17-316), and the possession, storage and sale of wildlife carcasses (A.R.S. §§ 17-307 and 17-319). Another statute regulates when and how bear and mountain lion may be captured and

killed. A.R.S. § 17-302. Various statutes regulate the use of trappers and guides, and provide for the issuance of various types of licenses to take wildlife. *See generally* A.R.S. Title 17, Ch. 3, Arts. 2 and 3. All of these regulated activities involve deliberate actions intended to kill or capture (i.e., "take") wildlife.

A.R.S. § 17-309 provides a comprehensive list of acts that violate Arizona's wildlife laws. The list contains prohibitions against taking wildlife (1) out of season, (2) in areas closed to taking, (3) in excess of bag limits, (4) with unlawful devices, and (5) without a license. *Id.* Likewise, the taking of wildlife by discharging a firearm, or any other device, from any motorized vehicle, including aircraft, train, powerboat, sailboat except as otherwise authorized is prohibited. A.R.S. § 17-301(B). Again, these activities involve conduct purposefully directed at wild animals, and are consistent with the definition of "take." There is no indication the legislature intended to grant the Commission authority to regulate ordinary land uses that indirectly kill wildlife.

In addition to using words describing activities specifically directed at killing or capturing animals in defining "take," and enacting statutes comprising a comprehensive program to regulate those activities, the remaining provisions of Title 17 are inconsistent with Plaintiffs' claim. For example, Title 17 of the Arizona Revised Statutes does contain certain provisions specifically addressing activities that may have indirect or unintended consequences with respect to the health and welfare of wildlife. For example, A.R.S. § 17-319 regulates the death of animals resulting from vehicular collisions. A.R.S. § 17-452 prohibits the use of motor vehicles in certain areas that could hamper wildlife reproductive success. A.R.S. § 17-237 authorizes the Commission to bring suit to restrain or enjoin entities from discharging or dumping into a stream or body of water any "deleterious substance which is injurious to wildlife." Notably, the violation of these statutes does *not* constitute an unlawful "taking" of wildlife.

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These provisions – in fact, substantial portions of Title 17 – would be unnecessary if all activities that kill or injure wildlife violate A.R.S. § 17-102, as Plaintiffs contend in this case.[3] Plaintiffs' view of the law conflicts with the well-established rule of statutory construction that requires statutes dealing with the same subject matter to be interpreted in a manner that harmonizes each of them.

> If reasonably practical, a statute should be explained in conjunction with other statutes to the end that they may be harmonious and consistent. If the statutes relate to the same subject or have the same general purpose – that is, statutes which are pari materia – they should be read in connection with, or should be construed together with other related statutes, as though they constituted one law. As they must be construed as one system governed by one spirit and policy, the legislative intent therefor must be ascertained not alone from the literal meaning of the wording of the statutes but also from the view of the whole system of related statutes. This rule of construction applied even where the statutes were enacted at different times, and contain no reference one to the other. . ..

State v. Sweet, 143 Ariz. 266, 269, 693 P.2d 921, 924 (1985), *quoting State ex rel Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (1970). It is apparent from the laws applicable to both wildlife and domestic livestock that the legislature did not intend to subject farmers and ranchers to liability based on activities indirectly causing the death of wild animals.

[3] The legislature has enacted a comprehensive regulatory scheme dealing with the ownership and handling of domestic livestock, codified in Title 3 of the Arizona Revised Statutes. A.R.S. §§ 3-1201 through 3-1481. The term "livestock" means "cattle, equine, sheep, goats and swine, except feral pigs." A.R.S. § 3-1201(5). Therefore, Plaintiffs' domestic goat herd, maintained on the La Osa Range, constituted livestock under Arizona law. The director of the Department of Agriculture "exercise[s] general supervision over the sheep and goat industries of the state." A.R.S. §3-1204(A). None of these statutes or their implementing regulations suggest that the escape of domestic livestock from their range, which results in the spread of an infectious disease to wildlife species, is a violation of Arizona law, or otherwise subject to regulation by the Commission under Title 17.

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IV. CONCLUSION

Plaintiffs' seventh cause of action is based on an erroneous interpretation of Arizona law, and should be rejected by the Court. Arizona's statutes governing the "taking" of wildlife do not regulate activities that may indirectly result in the death of wild animals. Given the comprehensive nature of Arizona's wildlife laws (in addition to the laws governing livestock ownership and handling), it is apparent that those laws regulate and, in some cases, proscribe activities that are purposively directed at killing or capturing wildlife (e.g., hunting, fishing or trapping animals), and do not extend to diseases alleged to have been incidentally communicated by livestock grazed on a range or similar sorts of indirect impacts caused by lawful land use activities. Accordingly, even if the factual allegations in Plaintiffs' Complaint were true, the transmission of disease by domestic goats resulting in the death of bighorn sheep is not actionable under Title 17, and Plaintiffs' seventh cause of action should be dismissed.

RESPECTFULLY SUBMITTED this 23rd day of May, 2005.

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

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Defendants.

NO. CV 2005-002692

GEORGE H. JOHNSON'S AND JANA S. JOHNSON'S REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

(Non-Classified Civil-Complex)

(Assigned to the Honorable Rebecca A. Albrecht)

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The State conceded in its Response that it is not pursuing:

1. Individual claims for personal liability against Mrs. Johnson [1]; and

2. Personal liability against Mr. Johnson with respect to Counts 7, 8, and 9 of the First Amended Complaint.[2]

If the State had not made the above statements in its Response, there would be no way of knowing, based on a diligent and careful reading of the First Amended Complaint, that the State was not pursuing personal liability claims against Mrs. Johnson, or that several of the State's causes of action did not seek personal liability against Mr. Johnson. And that is precisely the point of Mr. and Mrs. Johnson's Motion to Dismiss: The State has not pleaded factual allegations respecting Mr. and Mrs. Johnson that put them on notice of the claims against them.

The gravamen of Mr. and Mrs. Johnson's Motion to Dismiss is that, under Arizona law, a plaintiff's complaint may not rely on conclusions of law in place of material factual allegations. Nor may a plaintiff rely on unwarranted deductions from facts to support a claim against a defendant. In analyzing the sufficiency of a complaint, this Court must exclude all such legal conclusions and unwarranted factual deductions. When that analysis is conducted, there is nothing left to support any theory that Mr. Johnson should be held personally liable – save allegations that recite his status as an officer of various business entities which are also defendants in this case. As a matter of law, such allegations insufficiently allege personal liability on a corporate officer's part for his or her corporation's alleged negligence.

In its Response, the State reiterates the First Amended Complaint's defective allegations and recites several theories of liability it asserts may apply. Each of those theories

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[1] Plaintiff's Response to George H. Johnson's and Jana Johnson's Motion To Dismiss and Memorandum of Law In Support ("Response"), at p. 8 [fn 7].

[2] *Id.* at p. 5 [fn4].

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treats a director or officer's personal liability as an individual tort that is not derivative of the corporation's alleged conduct. The State's First Amended Complaint, treats Mr. Johnson's liability as derivative of the alleged conduct of five distinct business entities and must be dismissed. Also, several of the theories advanced by the State in its Response are unrecognized in Arizona, including a theory which purports to hold Mr. Johnson liable as a trustee of the Johnson Irrevocable Trust for alleged breach of contract, and one which purports to hold him liable under a "responsible corporate officer doctrine."

A. <u>Arizona Law Requires That Legal Conclusions and Unwarranted Deductions Made From Those Conclusions Must be Excluded When Analyzing Whether a Complaint Sufficiently States a Claim</u>.

When considering a motion to dismiss, well pleaded material allegations are taken as admitted, but conclusions of law or unwarranted deductions of fact are excluded. *Folk v. City of Phoenix*, 27 Ariz. App. 146, 551 P.2d 595 (1976); *Aldabbagh v. Arizona Department of Liquor Licenses and Control*, 162 Ariz. 415, 783 P.2d 1207 (App. 1989); *Verde Water & Power Co. v. Salt River Valley Water Users' Association*, 22 Ariz. 305, 197 P. 1927 (1921); 2A J. Moore, Federal Practice, 12.08 (2d ed. 1975). In *Folk,* the plaintiffs alleged that the City's plan to develop a roadway through the Phoenix Mountains Wilderness Preserve represented a taking of property without due process of law. According to the court, "the plaintiffs allege that the City's acts were 'unconstitutional,' unlawful, unreasonable, arbitrary, *ultra vires*, discriminatory, and in bad faith." *Folk*, 27 Ariz App. at 149, 551 P.2d at 598. The *Folk* court held that statements concerning the legality or reasonableness of the defendants' conduct were legal conclusions, and not factual allegations. The *Folk* court proceeded to analyze the complaint without considering any of the plaintiff's conclusory legal allegations. Stripped of all legal conclusions the *Folk* court held that: "Once we set aside the conclusions of law and the unwarranted deductions of fact in [Counts I and III] of plaintiffs' complaint, we find nothing remains upon which the court could grant relief." *Id.* at 150, 151, 551 P.2d at 598, 599.

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B. The "Material Allegations" Against Mr. Johnson in the State's First Amended Complaint Are Really Legal Conclusions That Are Unsupported By Any Alleged Facts.

The State's First Amended Complaint states at Paragraph 6 that "upon information and belief, George H. Johnson directed, approved, or acquiesced in many of the acts or omissions complained of herein." The State claims at Paragraph 7 that "George and Jana Johnson are personally liable as the co-trustees of the Johnson Trust." And at Paragraph 70, that the Johnson Trust "directed and/or knowingly permitted the trespasses alleged in paragraphs 32, 34-37 and 57-65." These statements are not facts at all. Rather, the statements are taken directly from the holding in *Bischofhausen, Vasbinder & Luckie v. D.W. Jacquays Mining and Equipment Contractors Co.*, 145 Ariz. 204, 700 P.2d 902 (App. 1985). In *Bischofhausen,* Division Two of the Court of Appeals held that corporate directors are not personally liable for torts committed by the corporation unless they "participate or have knowledge amounting to acquiescence or be guilty of negligence in the management or supervision of the corporate affairs causing or contributing to the injury." Id. at 210, 211, 700 P.2d at 908,909 *citing Jabczenski v. Southern Pacific Memorial Hospitals, Inc.*, 119 Ariz. 15, 579 P.2d 53 (App. 1978); *see also Keams v. Tempe Technical Institute, Inc.*, 993 F. Supp. 714, 726 (D. Arizona 1997) but *see State ex rel. Corbin v. United Energy Corp. of America*, 151 Ariz. 45, 50, 715 752, 757 (App. 1986) ("It is clear established that a director or officer of a corporation is individually liable for *fraudulent acts or false representations* of his own or in which he participates, even though his action in such respects may be in furtherance of the corporate business."); 18B Am. Jur.2d, *Corporations* § 1882 at 730 (1985); *L.B. Industries v. Smith*, 817 F.2d 69, 71 (9th Cir. 1987) (officer or director must "*specifically* direct, actively participate in, or knowingly acquiesce in the *fraud or other wrongdoing* of the corporation or its officers) (emphasis added)[3]

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[3] Although *L.B. Industries* did not involve a motion to dismiss, the court's holding is instructive because it required plaintiffs seeking to render corporate officials personally liable for corporate activities to plead "specifically." Here, Plaintiffs have not pleaded with any specificity with respect to the claims against Mr. Johnson, and as a result those claims must fail.

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Paragraphs 6, 7, and 70 of the First Amended Complaint advance legal conclusions that Mr. Johnson is personally liable in tort in the same manner as the *Folk* plaintiffs. Like the *Folk* plaintiffs, the State alleged no facts (whether on information and belief or otherwise) that would put Mr. Johnson on notice of acts or inactions allegedly undertaken by him that would subject him to the extraordinary measure of personal liability for alleged corporate negligence.[4] *See Albers v. Edelson Technology Partners L.P.*, 201 Ariz. 47, 31 P.3d 821 (App. 2001) (cause of action for breach of fiduciary duty between "co-venturers" dismissed where "[t]he complaint mentions the term only once in passing in the prefatory section. The term does not appear again in the 31 page complaint... They never allege any duty arising out of the status of co-venturers.").

The requirement that plaintiffs allege material allegations of fact against a defendant is not met in this case by the State's mere recitation of the Johnson's status as corporate officers. *See* First Amended Complaint, ¶¶ 7,8,10,11 (identifying Mr. and/or Johnson's status as corporate officer, director, etc. in five distinct business entities). An allegation that Mr. Johnson was affiliated with any business entity defendant is not sufficient to state a claim upon which relief can be granted. In Arizona, a director or officer of a corporation is not personally liable for the corporation's wrongful conduct "merely by virtue of the office they hold." *Bischofshausen,* 145 Ariz. at 210, 700 P2d at 908.[5] And the failure on a corporate

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[4] Federal cases cited by the State for the proposition that it is entitled to plead on information and belief are not instructive. The issue before the Court is not simply that the State set forth an allegation on information and belief; rather, the issue is whether the subject statements are legal conclusions that suffer *the additional infirmity* of having been made on information and belief. *Langadinos v. American* Airlines, 199 F.3d 68 (1st Cir. 2000), *Pennington Wholesale, Inc. v. Burger King Corporation*, 631 F.2d 1369 (10th Cir. 1980), and *Carroll v. Morrison Hotel Corporation*, 149 F. 2d 404 (7th Cir. 1945), shed no light on the issue before the Court.

[5] *See* also *Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003) ("corporate officer acting in his or her representative capacity and within his or her actual authority is not personally liable for such representative acts unless acting on behalf of an undisclosed principal"); *Alexie Inc. v Old South Bottle Shop Corp.*, 179 Ga. App. 190, 345 S.E.2d 875 (1986) (no liability where officer status was merely titular); *Rodriguez v Nishiki*, 65 Haw. 430, 653 P.2d 1145 (1982) (no liability where officer's role limited to fulfilling corporate formalities and allowing name to be used in corporate documents).

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officer's part to perform official functions or maintain corporate formalities is not enough to trigger personal liability. *See Keams*, 993 F. Supp. at 723. There are no facts that would notify Mr. Johnson of the extraordinary actions that would render him personally liable to any State agency.

Additionally, allegations concerning the acts of Defendants other than the Johnsons do nothing to state a claim against either Mr. or Mrs. Johnson, and the claims against them must therefore be dismissed. A corporate official's liability is personal, not derivative, and is premised on personal involvement in the corporation's activities. *See, e.g., Crigler v. Salac*, 438 So.2d 1375 (Ala. 1983); *Frances T. v. Village Green Owners Association*, 42 Cal.3d 490, 229 Cal. Rptr. 456, 723 P.2d 573 (1986); *see generally* RESTATEMENT SECOND, AGENCY § 343. Thus, allegations concerning the business entities' alleged conduct in this case are not sufficient to state a claim against Mr. Johnson, and those claims must be dismissed.

C. **Even If This Court Does Not Exclude The Legal Conclusions and Non-Material Allegations From The Plaintiff's First Amended Complaint, The State Has Not Met Its Notice Pleading Burden In This Case.**

Plaintiff cites *Rosenberg v. Rosenberg*, 123 Ariz. 589, 601 P.2d 589 (1979), for the rule that Arizona is a notice pleading state. While the hurdle represented by notice pleading is admittedly low, it is not non-existent. *Rosenberg* is illustrative of the amount of information necessary to state a claim for relief against a defendant. *Rosenberg* involved the interpretation and enforcement of a divorce decree. After carefully reviewing the allegations in the plaintiffs' complaint the *Rosenberg* court held:

> [P]laintiffs' complaint sufficiently placed defendant on notice of the relief sought. The conveyance claim was founded upon the 1962 divorce decree. The terms of the decree clearly provide that William was to pay child support and medical expenses. The decree was clearly alluded to in the complaint and a complete copy of the decree was attached to and incorporated in the petition by reference.

Id. at 593, 601 P.2d at 593.

Unlike the *Rosenberg* plaintiff, the State did nothing in its First Amended Complaint to put Mr. Johnson on notice of the acts the State alleges expose him to personal liability.

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In fact, the State never refers to the alleged actions or inactions that it avers Mr. Johnson took part in on behalf of the business entity defendants.

The other cases relied upon by the State also fail to support its argument that the First Amended Complaint is sufficient under Arizona law. *Corbin v. Pickrell*, 136 Ariz. 589, 667 P.2d 1304 (1983), is a case cited by the State for the proposition that motions to dismiss are not generally favored under Arizona law. At issue there, however, was the interpretation of an amendment to Arizona's Consumer Fraud Act and whether it could be applied in that case. Unlike the instant case, whether the plaintiffs had sufficiently provided notice of their claims under Rule 8A was not at issue in *Corbin*. In fact, allegations in the Corbin's complaint were specific enough to allow the court to limit the remedy pursued by plaintiffs to a portion of the time they claimed to have been harmed based on the fact that the statute in question did not cover the entire damages period. There is nothing in the State's First Amended Complaint that provides the Court or parties with anything specific about the claims alleged against the Johnsons.[6] On these grounds, the First Amended Complaint fails to state a claim upon which relief may be granted against Mr. or Mrs. Johnson, personally.

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[6] *See also Luchanski v. Congrove*, 193 Ariz. 176, 180, 971 P.2d 636, 640 (App. 1998) (no argument concerning the sufficiency of pleading under Rule 8A; whether jury could find that defendant was grossly negligent was for the jury where "appellees could not conclusively show that under the facts as pled or inferences from those facts, appellants could not prove that appellee's conduct constituted gross negligence."); *Sun World Corporation v. Pennysaver, Inc.*, 130 Ariz. 585, 637 P.2d 1088 (1981) (court found that under motion to dismiss standard complaint was sufficiently pled, stated facts susceptible of proof, and stated a claim); *Hunter Contracting Co. v. Superior Court*, 190 Ariz. 318, 947 P.2d 892 (App.1997)(distinguishable because the court reviewed plaintiff's failure to file an expert affidavit on Rule 11 grounds and permitted an otherwise well pleaded complaint to stand.) In the instant case, the Johnsons are not alleging that the Attorney General violated Rule 11. We are alleging that, unlike the *Hunter Contracting* complaint, the State's complaint insufficiently puts Mr. and Mrs. Johnson on notice of the claims alleged.

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D. The State Has Also Failed To State a Claim For Relief Against Mr. and Mrs. Johnson With Respect To Certain Causes of Action.

1. Allegations in the First Amended Complaint alleging breach of certain grazing leases fail to state a claim against Mr. Johnson.

Neither George nor Jana Johnson is alleged to have signed the grazing leases in this case in their individual capacities. (See First Amended Complaint at 7, 8). Nor has the State alleged that Mr. or Mrs. Johnson intended to be bound individually as a lessee under the lease. In Arizona, corporate officers are not liable for corporate contracts unless they have bound themselves individually. *Albers v. Edelson Technology Partners L.P.*, 201 Ariz. at 204, 31 P.3d at 824; *Ferrarell v. Robinson*, 465 P.2d 610, 11 Ariz. App. 473 (App. 1970).[7] Under these facts, the State clearly failed to state a claim for which relief may be granted against the Johnsons with regard to the alleged breach of grazing leases.

2. There Is No Case Law Supporting The Imposition of Personal Liability Against a Trustee of an Irrecovable Trust For Acts Undertaken By the Trustee That Allegedly Harmed Persons or Entities Other Than The Trust.

The State correctly points out that no case has ever construed the provision of the Probate Code upon which the State relies. Nor is the California case cited by the State dispositive. In that case, *Haskett v. The Villa at Desert Falls*, the court refused to hold a trustee personally liable "because the concept of 'fault' is a tort concept and [plaintiff] has failed to cite any legal authority demonstrating that [trustee] owed a duty of care to [plaintiff]."

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[7] Courts nationwide have held corporate officers are not responsible for the breach of contracts entered into by the company unless the corporate officer failed to disclose that the company was the principal in the contract. *Leonard v. McMorris*, 63 P.3d 323 (Colo. 2003) citing *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1231 (Ind. 1994) ("It is a matter of black-letter law that where the agent acted on behalf of the principal, the remedy of one seeking to enforce the contract is against the principal and not the agent"). *See also Cyber Media Group, Inc. v. Island Mortgage Network, Inc.*, 183 F. Supp. 2d 559, 582 (E.D.N.Y. 2002) (motion to dismiss breach of contract claim against corporate officer granted where complaint did not allege that contract explicitly bound corporate officer individually). Courts have also held that corporate officers cannot be held personally liable on contract claim for acts of corporation if contract does not explicitly bind the individual. *Cyber Media Group, Inc. v. Island Mortgage Network, Inc.*, 183 F. Supp. 2d 559 (E.D. N.Y. 2002).

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90 Cal. App. 4th 864, 108 Cal. Rptr. 864, 878 (App. 2001).[8] There is nothing in the instant case to support either the legal or factual position that Mr. and Mrs. Johnson owed the State any duty of care.

3. The "Responsible Corporate Officer Doctrine" Has Never Been Recognized In Arizona and Was Not Pleaded By the State in Its First Amended Complaint.

Liability under the "responsible corporate officer doctrine" was never alleged by the State in the First Amended Complaint. The theory has never been endorsed nor even mentioned by any Arizona court, and is nevertheless inapplicable to the facts of this case.

The "responsible corporate officer doctrine" emerged as a means of holding corporate officers criminally liable for violations they did not actually commit, but which occurred during their tenure with a company, and which could have been prevented by the officer. *United States v. Park*, 421 U.S. 658 (1943); *In re Dougherty*, 482 N.W.2d 485 (App. Minn. 1992) ("[t]he liability of managerial officers did not depend on their knowledge of, or personal participation in, the act ***made criminal*** by the statute") (emphasis added) *see also State of Hawaii v. Kailua Auto Wreckers, Inc.*, 62 Haw. 222, 615 P.2d 730 (1980) (interpreting *Park, et al.* as "based upon the recognized principle that a corporate agent, through whose act, default, or omission ***the corporation committed a crime***, was himself guilty individually ***of that crime***") (emphasis added). The responsible corporate officer doctrine was never intended to be used to establish liability for simple negligence.

Even if the responsible corporate officer doctrine applied to this case, and it does not, the State's First Amended Complaint fails to plead the doctrine. The doctrine requires:

> 1) the individual must be in a position of responsibility which allows the person to influence corporate policies or activities; 2) there must be a nexus between the individual's position and the violation in question such that the individual could have influenced the corporate actions which constituted the violations; and 3) the individual's actions or inactions facilitated the violations.

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[8] It is not at all clear from the *Haskett* facts whether a trustee can be liable to third parties not associated with the trust.

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In re Dougherty, 482 N.W.2d at 490. As discussed previously, the State failed to sufficiently plead any of the three *Park* factors other than to assert a legal conclusion about Mr. Johnson's alleged culpability and to identify him as an official in the defendant business entities.

E. The Claims Against Mr. and Mrs. Johnson Should Be Dismissed Without Leave At This Time To Amend.

Arizona courts have provided plaintiffs the opportunity to amend defective pleadings in circumstances where dismissal would work a harsh prejudice on the plaintiff and where the defect can easily be cured by amendment. *See, e.g., In re Cassidy's Estate*, 77 Ariz. 288, 270 P.2d 1079 (1954). In *Cassidy's Estate*, which was relied upon by the State in its Response, the plaintiff sought to revoke a will on grounds of fraud. The claim was dismissed after the applicable statute of limitations period had run, notwithstanding the fact that there was also pending a 'motion to make more definite and certain' which would have cured the defects in the pleading. *Id.* at 296, 270 P.2d at 1084.[9] In this case, dismissal of the claims against Mr. Johnson will work no such prejudice on the State. In this case there is no easy cure to the defects owing to the complete absence of factual allegations concerning the conduct of an individual, with regard to five business entities, that allegedly caused the business entities to commit negligence as enumerated in seven separate causes of action. Prior to filing its lawsuit the State, through its various agencies, investigated this case for over one year. Yet, factual allegations against Mr. and Mrs. Johnson individually are non-existent on the face of the State's 29-page First Amended Complaint.

There are also humanitarian grounds for dismissing Plaintiff's claims without allowing it to attempt to amend its complaint for a second time even before discovery commences. At 73 years of age, after having had quadruple bypass and heart-valve replacement surgery nine months ago, George Johnson is for the most part retired from business. Mr. Johnson

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[9] The *State also cited Republic Nat'l Bank of New York v. Pima County*, 200 Ariz. 199, 25 P.3d 201 (App. 2001), for this proposition. It should be noted, however, that in *Republic Nat'l*, the appellate court was asked to dismiss the plaintiff's complaint on grounds not raised in the motion to dismiss, and without knowing whether the complaint's defects could have been cured by amendment. *Id.* at 205, 25 P.3d at 7.

should not be required needlessly to participate in this case unless, and until, the State can sufficiently state a cause of action against him. Based on the two versions of the complaint filed in this case thus far, if the State is capable of doing so, it will not be until after substantial discovery is taken. Mr. and Mrs. Johnson should be given the benefit of the doubt that currently exists concerning those claims that allege they are personally liable.

CONCLUSION

For all the foregoing reasons, George and Jana Johnson respectfully request this Court to grant their Motion to Dismiss and dismiss them from this lawsuit.

RESPECTFULLY SUBMITTED this 6th day of July, 2005.

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

STATE OF ARIZONA, ex rel., STEPHEN A. OWENS, Director, Arizona Department of Environmental Quality; MARK WINKLEMAN, Commissioner, Arizona State Land Department; ARIZONA GAME AND FISH COMMISSION; DONALD BUTLER, Director, Arizona Department of Agriculture; ARIZONA BOARD OF REGENTS, on behalf of the Arizona State Museum, Plaintiffs, v. GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife; THE GEORGE H. JOHNSON REVOCABLE TRUST, and GEORGE H. JOHNSON and JANA JOHNSON, co-trustees; JOHNSON INTERNATIONAL INC.; THE RANCH AT SOUTH FORK, L.L.C.; GENERAL HUNT PROPERTIES, INC.; ATLAS SOUTHWEST, INC.; KARL ANDREW WOEHLECKE and LISA WOEHLECKE, husband and wife; JOHN DOE and JANE DOES, husbands and wives, 1 through 10; ABC CORPORATIONS, 1 through 10, Defendants.	NO. CV 2005-002692 **DEFENDANTS GEORGE H. JOHNSON AND JANA S. JOHNSON; GEORGE H. JOHNSON REVOCABLE TRUST, AND GEORGE H. JOHNSON AND JANA S. JOHNSON, CO-TRUSTEES; JOHNSON INTERNATIONAL INC.; THE RANCH AT SOUTH FORK, L.L.C.; GENERAL HUNT PROPERTIES, INC.; ATLAS SOUTHWEST, INC. REPLY IN SUPPORT OF OUR MOTION TO DISMISS CAUSE EIGHT OF PLAINTIFFS' COMPLAINT** (Non-Classified Civil-Complex) (Assigned to the Honorable Rebecca A. Albrecht)

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INTRODUCTION

Count Eight of Plaintiffs' Complaint should be dismissed because the State cannot use the permit regulations in the Taylor Grazing Act to hold Defendants liable on a negligence *per se* theory for the wrongful destruction of wildlife. The nature and purpose of the grazing regulations do not extend beyond the control of grazing rights and cannot be applied to hold ranchers liable for the wrongful destruction of wildlife. Wildlife is not mentioned or referred to in the regulations. A strained interpretation of the grazing regulations and incorporation of language from other statutes is required to support the State's theory.

ANALYSIS

The State points to two regulations it says can be used as a basis to hold Defendants liable on its negligence per se claim. Those two regulations are: 43 CFR 4140.1(a)(1) and 43 CFR 4140.1 (sic). [1]

The violation of an administrative regulation does not trigger a finding that the violator is negligent *per se*. The State concedes that a regulatory violation will not automatically result in a finding the violator was negligent *per se*. (Resp. at 6). The content and purpose of the regulations will determine whether the Court should utilize the regulatory standard as the standard of conduct of a reasonable person. RESTATEMENT (SECOND) OF TORTS, § 286 (1965); *Alaface v. Nation Inv., Co.*, 181 Ariz. 586, 892 P.2d 1375 (1995). In this case, both regulatory provisions fail to establish the requisite standard of care.

In order to establish a standard of care, a state or federal regulation must, in a mandatory fashion, specifically address the conduct which is prohibited. *Martin v. Schroeder*, 209 Ariz. 531, 105 P.3d 577 (App. 2005); RESTATEMENT (SECOND) OF TORTS, § 286 (1965).

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[1] The Defendants believe the State has misnumbered the regulations in its Complaint, Amended Complaint and Response. The correct citation may be 43 CFR 4150.1. Although the State may have incorrectly pled its cause of action, Defendants will assume for purposes of the Motion and the State's Response that the State meant to cite 43 CFR 4150.1. Defendants would rather address the issue than force the State to file a second Amended Complaint. Defendants assert the misnumbered regulations were addressed in the original motion even though the State takes a contrary view. (Resp. at 3). Defendants moved to dismiss the entirety of Count Eight which would include the misnumbered regulations. (Motion at 2). In any event, 43 CFR 4150.1 and 43 CFR 4140.1(b)(1) cannot be used as a basis for negligence *per se* for the same reasons the State cannot use 43 CFR 4140.1(a)(1).

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The State concedes there is no regulatory language mentioning wildlife in the grazing permit regulations. (Resp. at 7). The absence of language concerning wildlife is understandable given the stated purpose of the Taylor Grazing Act and its enabling statues.

The grazing regulations relied upon by the State are promulgated by the Secretary of the Interior pursuant to Congressional authorization in 43 USC § 315a. This enabling statute gives the Secretary the authority to promulgate regulations, enter into agreements, and do what is necessary to accomplish the purposes of the Taylor Grazing Act.[2] The Taylor Grazing Act was enacted by Congress for the stated purpose of permitting grazing on public lands to promote the highest use of the lands until their final disposal, and to stabilize the livestock industry. *See, eg., United States v. Fuller*, 442 F.2d 504 (9th Cir. 1971), *revd on other grounds*, 409 U.S. 488.[3] The preservation of wildlife is not a stated purpose of the Act and cannot be used by the State to justify its position that the regulations were enacted for the purpose of wildlife preservation.

The Federal Land Policy and Management Act ("FLPMA") [4] is another Act that enabled the Secretary to promulgate rules concerning the disposition of Federal public lands. The State also relies on the FLPMA in its attempt to hold Defendants liable for wildlife destruction.[5] The FLPMA makes no reference to wildlife, or the protection of the State in the event wildlife is destroyed. For these reasons, like the Taylor Grazing Act, the State cannot use the FLPMA to bolster its claims that the grazing regulations are meant to protect it from wrongful wildlife destruction.

The Secretary promulgated regulations which set forth general guideposts for the administration of grazing rights upon Federal public land. The rules were not established

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[2] 43 USC § 315-135r (1976).

[3] In addition to case law, 43 CFR 4100.0-1 states that the purpose of the Act is to provide uniform guidance for the administration of grazing on public lands exclusive of Alaska.

[4] 43 USC § § 1701-1784 is an expression of Federal Policy concerning the management, disposal and maintenance of Federal public land, through a consistent land use policy.

[5] 43 USC § 1701.

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to regulate a rancher's conduct for the protection of wildlife. There are numerous regulations authorizing the grazing use of the land, the content of the grazing permit, and the sanctions available for violation of the permitting requirements.[6] The sanction process for violation of permit terms includes notice, a hearing and appeal from the hearing before the sanction which is actually imposed by an administrative officer. 43 CFR 4150.2. A penalty provision is built into the regulations, which includes the suspension or cancellation of the permit. 43 CFR 4170.1-1. If the violation is wilful, a fine of not more than $500.00 may be assessed. 43 CFR 4170.2-1.

The regulations at issue in this case are silent with regard to the protection of wildlife. The regulations state that a permittee or lessee may be subject to a civil penalty under 43 CFR 4170.1 if he or she violates the special terms and conditions incorporated into a permit or lease. 43 CFR 4140.1(a)(1). The stated purpose of the regulations is to permit grazing on public lands, to promote the highest use of the Federal public lands and stabilize the livestock industry. *United States v. Fuller*, 442 F.2d at 507. The regulations are not meant to protect wildlife from the transmission of disease through some action of a member of the public. The regulations merely apprise ranchers of the need to comply with permitting requirements or be subject to a potential suspension or revocation of the permit. The regulations do not establish a standard of conduct meant to protect an identifiable group or entity. The protection and preservation of wildlife is left to other Federal and State laws, and not the grazing permit regulations cited by the State. Because the regulations are silent as to the specific conduct alleged by the State, they offer no guidance that may be used as a standard of conduct for the public.

Catchings v. City of Glendale, 154 Ariz. 420, 743 P.2d 400 (1987), is instructive on this point. In *Catchings*, a wrongful death action was brought against the City Airport alleging failure on its part to clear obstructions from the navigable airspace at the end of a

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[6] 43 CFR 4130.3-1 sets forth mandatory permit terms; 43 CFR 4130.3-2 allows other permit terms and conditions, all of the terms and conditions set forth general standards which do not identify the type of livestock, location, wildlife impact, or other specific conditions all of which are left to the discretion of the authorizing officer.

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runway. The *Catchings* plaintiff alleged that 14 CFR ¶ 77.21, which established standards for determining obstructions to air navigation, applied to existing man-made objects and natural growth. It was undisputed at trial that obstructions existed in violation of the regulations, which formed the basis of a negligence *per se* claim. Analyzing the regulation, the court found no mandatory language that specifically prohibited a particular type of conduct. Rather, the regulation established standards by which the airport could determine whether an object was or was not an obstruction. On this basis, the court refused to apply the negligence *per se* doctrine even though the regulation had been violated.

A review of the content of the grazing regulations demonstrate that they are general in nature and use discretionary language. The regulations cannot be used to form the basis of a claim for negligence *per se* because they to set forth a viable standard of conduct. Like the regulation in *Catchings*, the grazing regulations do not specifically prohibit particular conduct meant to protect an identifiable group, individuals, or entities.

The State ignores the fact that the regulations fail to mandate any particular conduct concerning the transmission of disease to wildlife. Also, the regulations are drafted using discretionary language. 43 CFR 4140.1(a)(1) uses the term "may" in identifying potential sanctions. Conduct which violates a term or condition in a permit may result in a civil penalty under 43 CFR 4170.1. [7] Contrary to the State's position, the regulations advise a permittee may be subject to administrative action upon violating the terms of the permit and advise the permittee of the potential for loss of grazing rights. [8] A violation must be found by an

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[7] The regulations primarily authorizes a designee of the Secretary to suspend, withhold, or cancel the permit, for permit holders. Non-permit holders are subject to other sanctions. No state civil penalties are mentioned in the penalty provisions.

[8] If the State is correct, the citizens of Arizona would be compelled to discover the content of each permit and lease issued by the Federal government to see if the content of that permit or lease prohibited some form of conduct in which they may engage. It would be impossible for the public to meet a standard of care that is not published in a regulation but is contained in any of a number of individual permits or leases. Each permit would change based upon the type of livestock involved , the location of the livestock, the size of the ranch, the type of wildlife in the area, the number of livestock, the scope of the available range and any number of variables that differ with each individual permit or lease.

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authorized representative of the Secretary and established through an administrative hearing before a sanction may be imposed. What the regulations lack is **the mandatory language directing a permit holder or other person from performing a specific act.** The absence of such mandatory language is fatal to the State's position that the regulations can form the basis of a finding of negligence *per se*.

The State was never meant to be protected by the Taylor Grazing Act. As mentioned previously, the purpose of the Act is to promote grazing on federal land and stabilize the livestock industry. Although the State may benefit from the regulations by increased tax revenue, the primary purpose of the regulations is to protect Federal public lands from over-grazing, and to stabilize range conditions for the livestock industry. The law was established to protect both ranchers and the Federal government from the destruction of forage in the public domain.[9]

The State suggests that the purpose of the Act is to preserve the land and its resources (including wildlife) from destruction or unnecessary injury. Despite the State's suggestion, the Taylor Grazing Act does not contain a definition of "resources," and the Congressional purpose of the Act did not include the protection of wildlife from destruction. In fact, the State bootstraps a definition from another statute concerning land use management in its attempt to create the needed language, which does not exist in the Taylor Grazing Act. In order to bring the State within the provisions of the Act, the State cites 43 USC § 1702(c), alleging this provision protects wildlife from destruction and can be used to show the Grazing Act is meant to protect the State. (Resp. at 7). The statute provides no such protection.[10]

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[9] See, Act of June 28, 1034, Pub.L.No. 482, ch. 865, 48 Stat. 1269 (preamble).

[10] 43 USC § 1702(c) provides:

> (c) the term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; the use of some land for less than

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The State fails to show that the regulations it relies upon provide as its purpose the protection of the State from the harm to be prevented by the regulations. Nor does the State provide any proof of Congress's intent to sustain its argument that the Secretary promulgated the regulations to protect the State's wildlife.

The State's position also makes no sense after reviewing the statutes and regulations as a whole. The Taylor Grazing Act and FLPMA were not established for the protection of wildlife. Through creative lawyering, the State weaves together several select portions of the statutes and regulations in its attempt to create a statutory duty. A common sense reading of the statutes and regulations leads to the inescapable conclusion that they were meant to protect the "grazing resources" from destruction by an unregulated livestock industry. The strained interpretation given by the State to create a duty where none exists should not be sanctioned by this Court. Quite simply, the statues and regulations were established to protect public lands from destruction. There are other State and Federal laws designed to provide for the protection of wildlife and to directly protect the State. Nevertheless, the State attempts to create a standard of care and a protected class from regulations, that do not protect the interest posited.

Although not fully discussed in other submissions to the Court, an issue remains concerning the use of 43 CFR 4150.1 as a basis to establish negligence *per se*. For the reasons

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all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

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previously stated, these regulations also fail to meet the requisite purposes, specificity and designation of protected interests to be used by the Court to establish a standard of care.[11]

43 CFR 4150.1 is specific as to who is protected by its terms. The regulation states that violators will be liable "to the United States" . . . for injury "to Federal property" caused by unauthorized grazing. The plain meaning of the regulation is to provide protection to the Federal government for unauthorized grazing. The penalty includes payment for forage consumed and a potential civil and/or criminal penalty. Absent from the regulation is any mention of any state in the Union, wildlife or the wrongful destruction of wildlife. The complete absence of the above leads to the conclusion that the purpose was not to protect the State from the wrongful destruction of its wildlife, but rather to control the destruction of available grazing forage by unregulated use of Federal public lands. As such, the Court should not use this regulation to establish a standard of conduct for the public to be held accountable on the basis of negligence *per se* for the wrongful destruction of wildlife in the State of Arizona.

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[11] As previously noted, these regulations have not been properly cited by the State, leading to some confusion even under a notice pleading standard. 43 CFR 4150.1 provides:

> Subpart 4150–Unauthorized Grazing Use
>
> Violation of Sec. 4140.1(b)(1) constitutes unauthorized grazing use.
>
> (a) The authorized officer shall determine whether a violation is nonwillful, willful, or repeated willful.
>
> (b) Violators shall be liable in damages to the United States for the forage consumed by their livestock, for injury to Federal property caused by their unauthorized grazing use, and for expenses incurred in impoundment and disposal of their livestock, and may be subject to civil penalties or criminal sanction for such unlawful acts.

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CONCLUSION

For the foregoing reasons Defendants respectfully request this Court to dismiss Plaintiffs' eighth cause of action.

RESPECTFULLY SUBMITTED this 6th day of July, 2005.

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ARIZONA SUPERIOR COURT

MARICOPA COUNTY

STATE OF ARIZONA, ex rel., STEPHEN A. OWENS, Director, Arizona Department of Environmental Quality; MARK WINKLEMAN, Commissioner, Arizona State Land Department; ARIZONA GAME AND FISH COMMISSION; DONALD BUTLER, Director, Arizona Department of Agriculture; ARIZONA BOARD OF REGENTS, on behalf of the Arizona State Museum, Plaintiffs, v. GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife; THE GEORGE H. JOHNSON REVOCABLE TRUST, and GEORGE H. JOHNSON and JANA JOHNSON, co-trustees; JOHNSON INTERNATIONAL INC.; THE RANCH AT SOUTH FORK, L.L.C.; GENERAL HUNT PROPERTIES, INC.; ATLAS SOUTHWEST, INC.; KARL ANDREW WOEHLECKE and LISA WOEHLECKE, husband and wife; JOHN DOE and JANE DOES, husbands and wives, 1 through 10; ABC CORPORATIONS, 1 through 10, Defendants.	NO. CV 2005-002692 **DEFENDANTS GEORGE H. JOHNSON AND JANA S. JOHNSON; GEORGE H. JOHNSON REVOCABLE TRUST; GEORGE H. JOHNSON AND JANA S. JOHNSON, CO-TRUSTEES; JOHNSON INTERNATIONAL, INC.; THE RANCH AT SOUTH FORK, L.L.C.; GENERAL HUNT PROPERTIES, INC.; AND ATLAS SOUTHWEST, INC. REPLY IN SUPPORT OF OUR MOTION TO DISMISS CAUSE SEVEN OF PLAINTIFFS' COMPLAINT** (Non-Classified Civil-Complex) (Assigned to the Honorable Rebecca A. Albrecht)

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The clear intent behind the statutory scheme established under Title 17 and more specifically A.R.S. §17-301 *et. seq.*, is to regulate the hunting, trapping, capturing, fishing and poaching of Arizona's wildlife.[1] In an attempt to expand the relatively simple language and intent behind these provisions, The State asks the Court to rely on a completely unrelated Federal statute from 1918. In so doing, the Stare ignores the established method for interpreting statutes in Arizona, which requires the court to look at the policy behind the statute and to the words, context, subject matter, effects, and consequences of the statute. If the words do not disclose the legislative intent, a court must examine the statute as a whole and give it a fair and sensible meaning. As demonstrated below, the death of wildlife indirectly caused by ordinary land use activities, such as farming and ranching, does not violate A.R.S. §17-314.

MEMORANDUM OF POINTS AND AUTHORITIES

I. LEGAL STANDARD

Although motions to dismiss are not favored in Arizona, they should be granted when a plaintiff can prove no set of facts which will entitle them to relief upon their stated claims. *Luchanski v. Congrove*, 193 Ariz. 176, 179, 971 P.2d 636, 639 (Ct. App, 1998); *Sun World Corp. V. Pennysaver, Inc.*, 130 Ariz. 585, 586, 637 P.2d 1088 (App. 1981). In this case, the State alleges that the Defendants violated Arizona's wildlife

[1] For the sake of convenience, these activities will collectively be referred to as "hunting activities" throughout this Reply.

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laws. Those laws, however, do not on their face, nor were they ever intended to, deal with anything other than activities associated with hunting. For this reason, the State cannot establish a claim for relief predicated on the statute or statutory scheme in question.

II. LEGAL ANALYSIS

A. Introduction

As an initial matter, the State takes issue with the fact that Defendants Motion to Dismiss does not mention A.R.S. §17-314. Although it is true that Count Seven is based on an alleged violation of A.R.S. §17-314, an interpretation of that statute must be placed in the proper context and be based on the plain meaning, definitions and legislative intent apparent in Title 17 and A.R.S. §17-301 *et. seq.* For this reason, Defendants focused their Motion not on the 15 lines that make up A.R.S. §17-314 but on the statutory scheme as a whole.

A court's objective, when construing statutes, is "to fulfill the intent of the legislature that wrote it." *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (Ariz.,1996); *citing State v. Williams,* 175 Ariz. 98, 100, 854 P.2d 131, 133 (1993); *see also Calvert v. Farmers Ins. Co. of Arizona*, 144 Ariz. 291, 294, 697 P.2d 684, 687 (1985) ("The cardinal rule of statutory interpretation is to determine and give effect to the intent of the legislature.") The State's Count Seven is based on Arizona wildlife statute A.R.S. §17-314. In essence, the statute provides that a civil action may be brought against any person unlawfully taking, wounding or killing, or unlawfully in possession of, a bighorn sheep or any part thereof. The State concedes that the plain meaning of words cannot be gleaned by a simple reading of the statute, when it looked outside the body of A.R.S. §17-314 to gain some understanding of the drafters' intent. But, instead of using the appropriate means for determining legislative intent, the State focuses its attention on the Migratory Bird Treaty Act (MBTA), a wholly unrelated Federal statute

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based on the intent of the U.S. Congress. Defendants can find no instance of a reported Arizona case where a court abandoned the accepted method of statutory interpretation – which relies upon the intent of the Arizona legislature – and instead relied solely on Congress's intent with respect to an unrelated statute.

B. Plaintiff's reliance on an unrelated Federal law and subsequent interpretation of A.R.S. § 17-314 is contrary to the intent of the Arizona legislature

In determining legislative intent, the court must look to the policy behind the statute and to the words, context, subject matter, effects, and consequences of the statute. *Luchanski*, 101 Ariz. at 452, 971 P.2d at 638; *Calvert*, 144 Ariz. at 294, 697 P.2d at 687. If the words do not disclose the legislative intent, the court must examine the statute as a whole and give it a fair and sensible meaning. *Luchanski*, 101 Ariz. at 452, 971 P.2d at 638; 971 P.2d 636, 193 Ariz. 176, *Robinson v. Lintz*, 420 P.2d 923, 927 (1966). As stated in *State ex rel. Larson v. Farley*, 106 Ariz. 119, 122, 471 P.2d 731, 734 (Ariz. 1970), the Court may look not just at the single statute, but the statutory scheme as a whole.

> "The general rule is that the court may look to prior and contemporaneous statutes in construing the meaning of a statute which is uncertain and on its face susceptible to more than one interpretation... If the statutes relate to the same subject or have the same general purpose--that is, statutes which are in *pari materia*--they should be read in connection with, or should be construed together with other related statutes, as though they constituted one law. As they must be construed as one system governed by one spirit and policy, the **legislative intent therefore must be ascertained not alone from the literal meaning of the wording of the statutes but also from the view of the whole system of related statutes.** *Id.* (emphasis added).

In determining the intent behind the drafting of A.R.S. § 17-314, the State relied upon the MBTA and Federal case law that analyzes its provisions. The MBTA was first adopted in 1918, and ratified by convention with Mexico in 1937. *See* 16 U.S.C.A. § 703. In contrast to the MBTA, the modern form of Title 17 was adopted several decades later. The broadened language of the MBTA provides that "it shall be

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unlawful **at any time, by any means** or **in any manner**, to pursue, hunt, take, capture, kill, attempt to take, capture or kill" any migratory bird. *See* 16 U.S.C. § 703(a) (emphasis added). Moreover, the corresponding case law suggests that the MBTA covers an extensive array of actions including the accidental killing of migratory birds with pesticides and the electrocution of migratory birds due to the lack of safety devices on power lines.[2] *United States v. Corbin*, 444 F. Supp. 510 (E.D. Ca. 1978); *United States v. Moon Lake*, 45 F. Supp. 2d 1070, 1071 (D. Colo. 1999).

But Congress's intent in drafting the MBTA is irrelevant to the interpretation or application of A.R.S. §17-314. Examining Congressional intent does nothing in the way of helping a court "fulfill the intent of the [state] legislature that wrote" the provisions of Title 17. *Zamora*, 185 Ariz. at 275. When a court conducts statutory interpretation, it must examine the context, subject matter, effect and consequences of the statute. *Luchanski*, 101 Ariz. at 452, 971 P.2d at 638. Likewise, the court must examine the statute as a whole and give its terms a sensible meaning. *Luchanski*, 101 Ariz. at 452, 971 P.2d at 638. In doing so, it is a court's prerogative to examine the whole system of related statutes in an attempt to ascertain the meaning of the provisions. *State ex rel. Larson*, 106 Ariz. at 122. But the statutes must be **related**, because the underlying goal is not to ascertain the intent of Congress or some other legislative body, but the Arizona legislature's intent in drafting the provisions in question.[3] The State's misplaced reliance

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[2] The State's citation of *Corbin* and *Moon Lake*, serves to illustrate Defendants' point because in those two cases, when a Federal court attempts to construe the meaning of the MBTA it relies on *Congressional intent* and not the intent of a state legislature.

[3] The MBTA was enacted in 1918. A.R.S. 17-301 *et seq.* and all related provisions, were drafted several decades later. There is no evidence that the Arizona legislature relied on the MBTA in defining terms such as"killing."

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on the MBTA does not shed light on A.R.S. §17-314 nor does it allow the Court to fulfill the intent of the Arizona legislature as required by *Zamora.*

The legislative intent behind Title 17 and the specific provisions of A.R.S. 17-301 *et seq.* is to regulate a much more narrow range of actions as they relate to an "unlawful killing." The provisions contain no mention of the broadened language "at any time, by any means or in any manner" as found in the MBTA. Likewise, the statutes related to A.R.S. §17-314 and contained wholly in Title 17, demonstrate that the intent behind the statutory scheme is to regulate actions which are related to hunting. For example:

- "A person shall not take wildlife, except aquatic wildlife, or discharge a firearm or shoot any other device from a motor vehicle..." A.R.S. 17-301(B).
- "Fish may be taken only by angling unless otherwise provided by the commission." A.R.S. 17-301(C).
- "It shall be unlawful to take wildlife with any leghold trap..." A.R.S. §17-301(D).
- "It is unlawful for a person to carry, transport or have in his possession devices for taking game within or upon a game refuge.." A.R.S. §17-305(A).
- "The carcass or parts thereof of wildlife lawfully obtained may be placed in storage..." A.R.S. §17-307(B)."
- "Any person who, while taking wildlife, is involved in a shooting accident resulting in injury to another person shall render every possible assistance to the injured person" A.R.S. §17-311(B).
- "It is a class 2 misdemeanor for a person while in a designated hunting area to intentionally interfere with the lawful taking of wildlife by another." A.R.S. §17-316(B).

Furthermore, the best example of the legislative intent and the lack of merit in State's expanded view of an "unlawful killing" can be found in A.R.S. §17-319. In this section, the legislature outlines the ramifications of a car hitting and killing big game animals. The section does not "exempt" what can only otherwise be considered a killing or a taking. There is no language that states, "a killing or a taking includes everything, except that which may occur because of an accident between a car and big game." Instead, A.R.S. §17-319 merely addresses whether the person who presumably hit the animal

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by accident, may possess the carcass. Therefore, if "take" or "kill" included every action, regardless of how the death occurred, then this section would have to include some exemption. Otherwise, a person could be granted a permit to possess the carcass, but would also be issued a citation or face civil liability for "killing" or "taking" the animal – which would make no sense.

More importantly, when the statutory scheme does attempt to regulate an action that may appear to be outside what is associated with normal hunting activities, the drafters create a specific provision. For example, A.R.S. §17-308 states it is unlawful for a person to camp within one-quarter mile of a water supply because of the threat to wildlife.

Likewise, A.R.S. §17-317 regulates the possession of the highly destructive non-native fish species known as the white amur.[4] A.R.S. §17-317(B) provides that "the department shall evaluate potential sites for the stocking of certified triploid white amur in this state. These sites shall be in closed aquatic systems as determined by the commission." The commission must take into consideration the flood potential of the aquatic system, proximity of the system to other systems, water movement in and out of the system and the risk of severe damage due to the possession of white amur. A.R.S. §17-317(B)(1) and (2).

Regulation of the white amur does not fall under what a layman would consider a traditional definition of hunting. Clearly, the legislature recognized this and drafted a specific provision to regulate conduct that did not fall within the otherwise consistent definition of "hunting" or "killing." By contrast, there are no provisions in

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[4] The white amur is an exotic minnow that was imported form eastern Asia in 1963. White amur are voracious feeders and are a good control source of nuisance aquatic vegetation in isolated lakes and ponds. However, in open waters, where white amur are able to spawn, they can be highly destructive. For that reason, many states, including Arizona, specifically regulate the introduction of the non-native white amur.

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A.R.S. § 17-301 *et seq.* that regulate the introduction of domestic goats. The Plaintiff has alleged that the introduction and resulting escape of domestic goats by the Defendants caused the "unlawful killing" of bighorn sheep under A.R.S. §17-314. However, there are no provisions within A.R.S. §17-301 *et seq.* that have anything to do with the regulation of the introduction and interaction of domestic goats and bighorn sheep.

The white amur's threat to native fish species and the alleged threat caused by domestic goats to bighorn sheep are analogous. Nevertheless, the drafters of A.R.S. §17-301 *et. seq.* only included a provision regulating possession of the white amur. Thus, the legislative intent was not to create a broad statutory scheme regulating all human caused wildlife deaths but, instead, to regulate activities normally associated with hunting and other specifically enumerated situations, like the white amur.

C. Plaintiff's claim is inconsistent with the intent and goal of A.R.S. § 17-301 *et. seq.*, to regulate activities associated with hunting

Plaintiff's contention that Defendants' actions constitute an unlawful killing is not supported by applicable statutory law. There is simply no basis for Plaintiff's extraordinarily broad interpretation of A.R.S. §17-314. Arizona's wildlife statutes prohibit activities that "take" wildlife. A "taking" of wildlife involves pursuing, shooting, hunting, fishing, trapping, **killing**, capturing, snaring or netting of wildlife or the placing or using of any net or other device or trap in a manner that may result in the capturing or killing of wildlife. A.R.S. § 17-101 (A)(18) (emphasis added). The legislature's use of the word "killing" in defining the word "take" was not intended to expand the definition of "killing" but instead to reinforce and demonstrate what activities constitute a taking. A contrary

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interpretation would render much of the "take" definition superfluous.[5] Thus, a killing of wildlife is simply a type of taking under the statutory scheme.

As such, A.R.S. 17-301 *et. seq.*, creates a comprehensive scheme with the intent of regulating those activities which are normally associated with hunting or are specifically enumerated in other provisions of Title 17. There is no evidence to suggest that the drafters of the legislation intended to regulate the alleged accidental death of bighorn sheep as a result of interaction with domestic goats. Moreover, there is no evidence to suggest that this activity constitutes the type of hunting activity that is considered a killing or a taking under the statutory scheme. The legislature left no doubt that when it intended to regulate a specific non-hunting related activity, a separate provision, such as those relating to camping near a watering hole or possession of a white amur, would be enacted. Therefore, Plaintiff's claim that an unlawful killing under A.R.S. §17-314 encompasses the accidental death of bighorn sheep, is wholly inconsistent with the statute.

III. CONCLUSION

The State has claimed that the indirect death of bighorn sheep as a result of the grazing of goats, is regulated as an unlawful killing under A.R.S. §17-314. To substantiate this claim, the State ignores established statutory interpretation under Arizona law and instead relies on a totally unrelated Federal act. In doing so, the State fails to recognize the intent of the Arizona legislature in only regulating hunting activities and other specifically enumerated activities. As such, the State's definition of "unlawful

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[5] A statute should be interpreted "whenever possible, so no clause, sentence or word is rendered superfluous, void, contradictory, or insignificant." *Samsel v. Allstate Insurance Co.*, 199 Ariz. 480, 483, 19 P.3d 621, 624 (App. 2001), *quoting Continental Bank v. Arizona Dep't of Revenue*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

killing" is inconsistent with the statutory scheme as a whole and Count Seven of Plaintiff's Complaint should be dismissed.

RESPECTFULLY SUBMITTED this 6th day of July, 2005.

JONES, SKELTON & HOCHULI, P.L.C.

By /s/ Scott W. Hulbert

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ORIGINAL e-filed and served this 6th day of July, 2005, to:

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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

STATE OF ARIZONA, *ex rel*, STEPHEN A. OWENS, Director, Arizona Department of Environmental Quality; MARK WINKLEMAN, Commissioner, Arizona State Land Department; ARIZONA GAME AND FISH COMMISSION; DONALD BUTLER, Director, Arizona Department of Agriculture; ARIZONA BOARD OF REGENTS, on behalf of the Arizona State Museum,

Plaintiffs

v.

GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife; THE GEORGE H. JOHNSON revocable trust, and GEORGE H. JOHNSON and JANA JOHNSON, co-trustees; JOHNSON INTERNATIONAL, INC.; THE RANCH AT SOUTHFORK, LLC; GENERAL HUNT PROPERTIES, INC.;ATLAS SOUTHWEST, INC.; KARL ANDREW WOEHLECKE and LISA WOEHLECKE, husband and wife; JOHN DOE and JANE DOE, husband and wives, 1 through 10; ABC CORPORATIONS, 1 through 10,

Defendants.

Case No. CV2005-002692

COUNTERCLAIM

(Assigned to the Honorable Rebecca A. Albrecht)

GEORGE H. JOHNSON; JOHNSON INTERNATIONAL, INC.,

Counterclaimants,

v.

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY, STEPHEN A. OWENS and JANE DOE OWENS, husband and wife, OFFICE OF THE ATTORNEY GENERAL, TERRY GODDARD and JANE DOE GODDARD, husband and wife,

Counterdefendants.

Defendants/Counterclaimants, George H. Johnson and Johnson International, Inc. ("Counterclaimants") hereby allege as follows:

Parties and Venue

1. George H. Johnson is a married individual who resides in Maricopa County, Arizona.

2. Johnson International, Inc. is an Arizona corporation doing business in Maricopa County, Arizona.

3. Counterdefendant, Arizona Department of Environmental Quality ("ADEQ") is an agency of the State of Arizona, and operates in Maricopa County, Arizona.

4. Counterdefendants Stephen Owens and Jane Doe Owens are individuals residing in Maricopa County, Arizona.

5. At all times relevant hereto, Stephen Owens and Jane Doe Owens were and are husband and wife and acted on behalf of the marital community.

6. Counterdefendant, the Office of the Attorney General, is an agency of the State of Arizona and operates in Maricopa County, Arizona.

7. Counterdefendants Terry Goddard and Jane Doe Goddard are individuals residing in Maricopa County, Arizona.

8. At all times relevant hereto, Terry Goddard and Jane Doe Goddard were and are husband and wife and acted on behalf of the marital community.

9. This Court has personal jurisdiction over all of the Parties, and venue is proper in Maricopa County, Arizona.

General Allegations

10. La Osa Ranch is a large working ranch located north of Sasco Road and west of Interstate Highway 10 in Pinal County, Arizona.

11. King Ranch is an adjoining working ranch located south of Sasco Road in Pinal County. (The La Osa and King Ranches are collectively referred to as the "Ranches").

12. The Ranches have been farmed and ranched for decades.

13. In February, 2003, General Hunt Properties, Inc. acquired La Osa Ranch.

14. In May, 2003, The George H. Johnson Revocable Trust ("Johnson Trust") acquired King Ranch.

15. The Ranches were acquired to continue and expand upon their long history of ranching and agriculture.

16. There were several hundred head of cattle on the Ranches when they were acquired.

17. In late 2002/early 2003, a plan was conceived to assemble an economically viable livestock operation on the Ranches, and for this purpose a consultant was retained to prepare a range and ranch management plan proposal.

18. The ranch management plan was to assemble land and water rights to rehabilitate agricultural fields located on the Ranches.

19. A plan to channelize the Santa Cruz River as it passed through the King Ranch was prepared to provide irrigated pasture land and to provide dependable irrigation to the rest of the King Ranch once it had been rehabilitated.

20. In furtherance of these agricultural goals, a ranch manager was hired and irrigation equipment was purchased at a cost of over one million dollars.

21. After the purchase of the Ranches, significant work was undertaken for irrigation channeling and irrigation wells. Irrigation equipment was purchased and substantial funds were spent to improve and expand the La Osa and King Ranches' agricultural and ranching activities.

22. New non-potable wells were drilled and existing wells were rehabilitated for farm and ranch use at a substantial cost.

23. Various other significant measures to improve the ranching and agricultural productivity of the Ranches were undertaken, including the construction of ranch fencing and corrals, agricultural irrigation, tilling of soil for agricultural purposes, seeding, and entering into various long term agricultural arrangements.

24. Over one million dollars was spent to restore, improve and expand the Ranches' agricultural capacity.

25. Throughout the time that General Hunt and Johnson Trust owned the La Osa and King Ranches, the Ranches were used exclusively for ranching and agricultural purposes.

26. Livestock population was increased and nearly 1,500 head of cattle were imported to increase the population to approximately 2,000 head of cattle.

27. In connection with the agricultural and ranching activities of the Ranches, it was determined that they could profitably be used to raise and pasture goats for commercial marketing.

28. The ranch manager determined that the goats would do well in the Ranches' shrub areas. In addition to cattle, approximately 5,000 goats were imported from Texas and placed on the Ranches.

29. Prior to their arrival, the goats were fully inspected and inoculated and their purchase and transport to the Ranches complied in all respects with applicable State and Federal law.

30. The goats were in sound and healthy condition, and carried no communicable diseases.

31. Upon arrival at the Ranches, the goats were evaluated by a veterinarian, and were immunized and tagged. Also, after arrival from Texas, the herd was quarantined and monitored.

32. In order to increase the productivity of the Ranches' grazing land, portions were cleared to allow for forage seeding and to improve the quantity and quality of grasses. It was anticipated that seeding would increase the Ranches' available grazing land and, hence, its productivity.

33. The decision to clear portions of the Ranches was made for ranching and grazing purposes and not to facilitate development activities.

34. Ranch clearing activities were undertaken by an independent contractor, 3F Contracting, Inc.

35. Before 3F Contracting came on site, the King Ranch was surveyed. The corner boundaries between the King Ranch and public land were marked with 20' high poles. The 20' poles were highly visible and obvious.

36. Additionally, narrow strips of land between poles were cleared to make the Ranch boundaries even more obvious.

37. More than $90,000 was spent surveying and marking the boundaries of King Ranch prior to clearing portions of King Ranch.

38. Only after completing a boundaries survey of the Ranches and staking and marking, was 3F Contracting hired to clear portions of the King Ranch.

39. 3F Contracting was instructed to clear only land on the King Ranch. 3F representatives were instructed to not clear land outside the marked and staked boundary lines.

40. At no time did George H. Johnson, Johnson International, Inc., the Johnson Trust, General Hunt Properties and/or Atlas Southwest, Inc. or any other individual or entity affiliated with the Defendants instruct 3F Contracting to clear land beyond Ranch boundaries.

41. 3F Contracting was expressly informed that State Land lay beyond the marked boundaries.

42. 3F Contracting was directed to clear only the immediate surface of the land.

43. Despite instructions to the contrary, 3F Contracting employees cleared some State Land beyond the marked boundaries.

44. Upon information and belief, 3F Contracting scraped only the top few inches of ground, and at no point dug more than a few inches into the ground while clearing.

45. Neither George Johnson, Johnson International, Inc., General Hunt Properties, Inc., nor any other individual or entity affiliated with Johnson was

aware that State Land was being cleared by 3F Contracting until after the clearing activities took place.

46. At no time relevant to this lawsuit did George Johnson, Johnson International, Inc. or any entity or individual affiliated with Johnson, direct 3F Contracting to clear State land, or to clear any land beyond the marked property boundaries.

47. George H. Johnson is the owner and principal of Johnson Utilities, LLC. Johnson Utilities is an affiliate of Johnson International and is regulated by the Arizona Corporation Commission as a public utility company and Johnson Utilities participates in various proceedings before that agency.

48. Johnson Utilities frequently has business matters before ADEQ and processes various applications before that agency.

49. ADEQ has previously taken actions against Johnson Utilities that were not supported by the law or regulations of the ADEQ.

50. ADEQ has previously applied disparate standards to Johnson Utilities not applicable to other utilities, and has unlawfully imposed burdens and procedures on Johnson Utilities not applicable to other utilities.

51. ADEQ has illegally applied "hidden" rules to Johnson Utilities and has otherwise required disparate capacity requirements and standards of Johnson Utilities.

52. ADEQ expressed a generally hostile attitude toward Johnson Utilities, its principals, owners and managers, and intentionally and knowingly singled out Johnson Utilities and its owners and managers for increased unlawful disparate regulation.

53. Johnson Utilities has resisted ADEQ's unlawful and illegal application of policies and procedures to Johnson Utilities.

54. As a result of this resistance, ADEQ and other governmental agencies have retaliated against the principals of Johnson Utilities and its related entities.

55. Beginning in December, 2003, ADEQ representatives and the Office of the Attorney General began making false, inflammatory, and damaging statements to the press directed against the owners of Johnson Utilities, George H. Johnson and related company, Johnson International, regarding the management of the Ranches.

56. In or about December, 2003, the Director of the Environmental Quality, Stephen A. Owens, made the following statements to the press:

- "Johnson International seems to be deliberately choosing not to comply with State environmental laws."
- "Johnson International is a large sophisticated outfit that obviously has had experience with environmental laws and has violated them on numerous occasions in the past."
- "It [Johnson's claim that it was involved in agriculture on the Ranches] doesn't really pass the laugh test."

57. Mr. Owens made similar statements to the press during this time period.

58. The above-referenced statements were intended to, and did, damage Johnson's reputation within the business community.

59. The above-referenced statements were false and/or cast Defendants in a false light, and Mr. Owens was aware that his statements were false.

60. Johnson Utilities and related parties had previously provided voluminous documentation demonstrating the falsity of the above-referenced statements over a one year period prior to Mr. Owens' statements.

61. The above-referenced statements were not motivated by an intent to properly apply relevant law but, rather, were motivated by political considerations, in an effort to further Mr. Owens' career and the ADEQ's political agenda.

62. The above-referenced statements have been continually published and re-published by various publications, including but not limited to the *Arizona Republic, Phoenix New Times, Arizona Daily Star* and on ADEQ's website. These statements have been published and re-published at least as late as April, 2005.

63. Additionally, Mr. Owens, through ADEQ, published a Notice of Violation to the press accusing Johnson Parties of wrongful activities, without first notifying the Johnson Parties of the Notice and without first allowing the Johnson Parties to respond. The Johnson Parties received the Notice of Violation approximately 3 days after it had been released to the press.

64. Other actions were taken and other documents were published which were intended to adversely impact George Johnson's and Johnson International's reputations and abilities to do business.

65. On or about February 14, 2005, the Attorney General of the State of Arizona issued a press release concerning the Johnson Parties.

66. The February 2005 press release, and in various publications and settings relating to that press release, Terry Goddard made a number of false and defamatory statements directed at the Johnson Parties. For example, Mr. Goddard accused the Johnson Parties of the following:

- Committing "wanton destruction of Arizona's heritage resources";
- Committing "numerous violations of State law";
- "Illegally bulldozing and clearing approximately 270 acres of State trust lands";

- Bulldozing and clearing private land without obtaining permits required by state law;
- "Destroying portions of seven major Hohokam archeological sites";
- "Failing to comply with statutory requirements relating to destruction of protected native plants";
- "Violating the State's Clean Water Laws";
- Negligently causing a disease epidemic that resulted in the death of at least 21 rare Arizona desert Big Horn sheep;
- "Moonscaping" State trust lands.

67. These and other statements were intended to, and did, damage George Johnson's and Johnson International's reputation throughout the business community.

68. Additionally, this information was leaked to the press without first notifying the Johnson Parties, who first discovered the existence of the statements and claims from third party sources.

69. These statements were made to the press despite knowledge on Mr. Goddard's part that such statements were false and/or misleading.

70. Counterdefendants had possession of, and ignored, documents and information demonstrating the falsity of these and similar statements prior to the publication of said statements.

71. These statements were not motivated by an intent to properly apply relevant law, but were rather motivated by political considerations, specifically in order to further Mr. Goddard's political career.

72. These statements were published and had been continually re-published in various publications, including but not limited to the *Arizona Republic*. Such re-publications occurred through at least April 2005.

73. The defamatory actions, statements, and trespasses made against Johnson were and are part of a larger scheme of selective and arbitrary enforcement, which has been perpetrated for several years and continues to this day.

74. The above-captioned lawsuit filed against George Johnson, Johnson International and the other Defendants is one aspect of this selective and arbitrary enforcement.

75. Despite knowledge that third-parties were responsible for the complained-of activities, Counterdefendants chose only to file actions against parties affiliated with George Johnson, and failed to file actions against parties unaffiliated with George Johnson, despite their affirmative knowledge that such parties were responsible for the complained-of activities.

76. Specifically, despite knowledge of their wrongful activities, the Counterdefendants chose not to include 3F Contracting, the principles of 3F Contracting, Preston Drilling, the principles of Preston Drilling, the City of Tucson, and others responsible for the allegedly unlawful, negligent, or intentional act but has instead focused their energies exclusively in pursuit of George Johnson and his related entities and individuals.

77. The above-referenced statements, and the other actions taken by ADEQ, including the issuance of notices of violation, foot-dragging concerning approvals, and other actions, has deprived Johnson of the rights and privileges otherwise afforded individuals and companies in the State of Arizona.

78. These statements and actions have frustrated and impeded the Johnson Parties' regulatory proceedings and filings and had the intent and purpose of disparaging and putting the Johnson Parties in a false light in order to

harm and damage the Johnson Parties by interfering with advantageous contractual and business relationships and by breach of statutory duties.

79. The foregoing actions undertaken and statements made were continually re-published at least through April, 2005.

80. The foregoing actions were unlawful and the foregoing statements were false.

81. Counterdefendants either knew or should have known that their actions were unlawful and the above-referenced statements were false, and they adversely impacted and damaged Counterclaimants' reputation, standing and business dealings within the community.

82. The foregoing actions and statements were not privileged.

83. The foregoing actions and statements are actionable *per se*.

84. Counterdefendants also took actions which were intended to and did disparage, defame and put George Johnson and Johnson International in a false light.

85. The actions of the Counterdefendants were both within and outside the scope of their employment and therefore entitle Counterclaimants to compensatory and punitive damages.

86. The actions of the Counterdefendants were undertaken with a reckless disregard for the lawful rights of the Counterclaimants, were intentional and wilful and were of such an outrageous nature as to give rise to punitive damages.

Wherefore, Counterclaimants pray for judgment against Counterdefendants as follows:

(A) For damages incurred in an amount to be determined at trial but in no event less than

(i) $20,000,000 as to George H. Johnson and Jana Johnson;

(ii) $10,000,000.00 as to the George H. Johnson Revocable Trust;

(iii) $10,000,000.00 as to Johnson International, Inc.;

(B) For punitive damages in an amount to be determined at trial;

(C) For Counterclaimants' attorney's fees incurred;

(D) For the costs and expenses incurred in bringing this action; and

(E) For such other and further relief as this Court may deem just and proper.

DATED this 13th day of October, 2005.

MARGRAVE CELMINS, P.C.

/s/Lat J. Celmins
Lat J. Celmins
Michael L. Kitchen
Attorneys for Johnson Defendants and Counterclaimants

Copy of the foregoing delivered via LexisNexis File and Serve this 13th day of October, 2005 to:

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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

STATE OF ARIZONA, *ex rel*, STEPHEN A. OWENS, Director, Arizona Department of Environmental Quality; MARK WINKLEMAN, Commissioner, Arizona State Land Department; ARIZONA GAME AND FISH COMMISSION; DONALD BUTLER, Director, Arizona Department of Agriculture; ARIZONA BOARD OF REGENTS, on behalf of the Arizona State Museum,

Plaintiffs

v.

GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife; THE GEORGE H. JOHNSON revocable trust, and GEORGE H. JOHNSON and JANA JOHNSON, co-trustees; JOHNSON INTERNATIONAL, INC.; THE RANCH AT SOUTHFORK, LLC; GENERAL HUNT PROPERTIES, INC.;ATLAS SOUTHWEST, INC.; KARL ANDREW WOEHLECKE and LISA WOEHLECKE, husband and wife; JOHN DOE and JANE DOE, husband and wives, 1 through 10; ABC CORPORATIONS, I through 10,

Defendants.

Case No. CV2005-002692

RULE 26.1 DISCLOSURE STATEMENT OF JOHNSON COUNTERCLAIMANTS / THIRD-PARTY PLAINTIFFS

(Assigned to the Honorable Rebecca A. Albrecht)

GEORGE H. JOHNSON; JOHNSON INTERNATIONAL, INC.,

Counterclaimants,

v.

ARIZONA DEPARTMENT OF ENVIRONMENTAL QUALITY, STEPHEN A. OWENS and JANE DOE OWENS, husband and wife, OFFICE OF THE ATTORNEY GENERAL, TERRY GODDARD and JANE DOE GODDARD, husband and wife,

Counterdefendants.

GEORGE H. JOHNSON and JANA S. JOHNSON, husband and wife; THE GEORGE H. JOHNSON REVOCABLE TRUST; and GEORGE H. JOHNSON and JANA JOHNSON, co-trustees; JOHNSON INTERNATIONAL, INC.; THE RANCH AT SOUTH FORK, LLC; GENERAL HUNT PROPERTIES, INC.; ATLAS SOUTHWEST, INC.,

Third-Party Plaintiffs,

vs.

3F CONTRACTING, INC.; BILL PRESTON WELL DRILLING dba PRESTON WELL DRILLING; JOHN and JANE DOES 1-10; ABC PARTNERSHIPS 1-10; ABC LIMITED LIABILITY COMPANIES 1-10; XYZ CORPORATIONS 1-10,

Third-Party Defendants.

Pursuant to Arizona Rules of Civil Procedure, Rule 26.1, Counterclaimants/ Third-Party Plaintiffs, George H. Johnson and Johnson International, Inc. ("Counterclaimants") hereby submit their Initial Rule 26.1 Disclosure Statement. This Disclosure Statement supplements the Disclosure Statement filed this date

by Johnson's co-counsel at Jones, Skelton & Hochuli, PLC. That Disclosure Statement and all contents therein are hereby incorporated by reference.

I. FACTUAL BASIS

A. FACTUAL BASIS OF COUNTERCLAIM.

George H. Johnson is the owner and principal of Johnson Utilities, LLC. Johnson Utilities is an affiliate of Johnson International and is regulated by the Arizona Corporation Commission as a public utility company and Johnson Utilities participates in various proceedings before that agency. Johnson Utilities frequently has business matters before ADEQ and processes various applications before that agency.

ADEQ has previously taken actions against Johnson Utilities that were not supported by the law or regulations of the ADEQ and has previously applied disparate standards to Johnson Utilities not applicable to other utilities, and has unlawfully imposed burdens and procedures on Johnson Utilities not applicable to other utilities.

ADEQ has illegally applied "hidden" rules to Johnson Utilities and has otherwise required disparate capacity requirements and standards of Johnson Utilities. ADEQ expressed a generally hostile attitude toward Johnson Utilities, its principals, owners and managers, and intentionally and knowingly singled out Johnson Utilities and its owners and managers for increased unlawful disparate regulation. Johnson Utilities has resisted ADEQ's unlawful and illegal application of policies and procedures to Johnson Utilities. As a result of this resistance, ADEQ and other governmental agencies have retaliated against the principals of Johnson Utilities and its related entities.

Beginning in December, 2003, ADEQ representatives and the Office of the Attorney General began making false, inflammatory, and damaging statements to the press directed against the owners of Johnson Utilities, George H. Johnson and related company, Johnson International, regarding the management of the Ranches. In or about December, 2003, the Director of the Environmental Quality, Stephen A. Owens, made the following statements to the press:

- "Johnson International seems to be deliberately choosing not to comply with State environmental laws."
- "Johnson International is a large sophisticated outfit that obviously has had experience with environmental laws and has violated them on numerous occasions in the past."
- "It [Johnson's claim that it was involved in agriculture on the Ranches] doesn't really pass the laugh test."

Mr. Owens made other similar statements to the press during this time period, which statements will be revealed during the course of discovery. The above-referenced statements were intended to, and did, damage Johnson's reputation within the business community. The above-referenced statements were false and/or cast Defendants in a false light, and Mr. Owens was aware that his statements were false.

Johnson Utilities and related parties had previously provided voluminous documentation demonstrating the falsity of these and similar statements over a one year period prior to Mr. Owens' statements. These and similar statements were motivated by political considerations, in an effort to further Mr. Owens' career and the ADEQ's political agenda. These and similar statements have been continually published and re-published by various publications, including but not limited to the *Arizona Republic, Phoenix New Times, Arizona Daily Star* and on

ADEQ's website. These statements have been published and re-published at least as late as April, 2005.

Additionally, Mr. Owens, through ADEQ, published a Notice of Violation to the press accusing Johnson Parties of wrongful activities, without first notifying the Johnson Parties of the Notice and without first allowing the Johnson Parties to respond. The Johnson Parties received the Notice of Violation approximately 3 days after it had been released to the press. It is anticipated that further discovery will reveal that other actions were taken and other documents were published which were intended to adversely impact George Johnson's and Johnson International's reputations and abilities to do business.

On or about February 14, 2005, the Attorney General of the State of Arizona issued a press release concerning the Johnson Parties. The February 2005 press release, and in various publications and settings relating to that press release, Terry Goddard made a number of false and defamatory statements directed at the Johnson Parties. For example, Mr. Goddard accused the Johnson Parties of the following:

- Committing "wanton destruction of Arizona's heritage resources";
- Committing "numerous violations of State law";
- "Illegally bulldozing and clearing approximately 270 acres of State trust lands";
- Bulldozing and clearing private land without obtaining permits required by state law;
- "Destroying portions of seven major Hohokam archeological sites";
- "Failing to comply with statutory requirements relating to destruction of protected native plants";
- "Violating the State's Clean Water Laws";

- Negligently causing a disease epidemic that resulted in the death of at least 21 rare Arizona desert Big Horn sheep;
- "Moonscaping" State trust lands.

These and other statements that will be revealed in the course of discovery were intended to, and did, damage George Johnson's and Johnson International's reputation throughout the business community. Additionally, this information was leaked to the press without first notifying the Johnson Parties, who first discovered the existence of the statements and claims from third party sources. These statements were made to the press despite knowledge on Mr. Goddard's part that such statements were false and/or misleading.

Like the ADEQ, Goddard and the Attorney General's Office had possession of, and ignored, documents and information demonstrating the falsity of these and similar statements prior to the publication of said statements. These statements were not motivated by an intent to properly apply relevant law, but were rather motivated by political considerations. These statements were published and had been continually re-published in various publications, including but not limited to the *Arizona Republic*. Such re-publications occurred through at least April 2005. The defamatory actions, statements, and trespasses made against Johnson were and are part of a larger scheme of selective and arbitrary enforcement, which has been perpetrated for several years and continues to this day. This lawsuit is one aspect of this selective and arbitrary enforcement.

Despite knowledge that third-parties were responsible for the complained-of activities, Counterdefendants chose only to file actions against parties affiliated with George Johnson, and failed to file actions against parties

unaffiliated with George Johnson, despite their affirmative knowledge that such parties were responsible for the complained-of activities.

Specifically, despite knowledge of their wrongful activities, the Counterdefendants chose not to include 3F Contracting, the principles of 3F Contracting, Preston Drilling, the principles of Preston Drilling, the City of Tucson, and others responsible for the allegedly unlawful, negligent, or intentional act but has instead focused their energies exclusively in pursuit of George Johnson and his related entities and individuals.

These and similar statements, and other actions taken by ADEQ, including the issuance of notices of violation, foot-dragging concerning approvals, and other actions, has deprived Johnson of the rights and privileges otherwise afforded individuals and companies in the State of Arizona. These statements and actions have frustrated and impeded the Johnson Parties' regulatory proceedings and filings and had the intent and purpose of disparaging and putting the Johnson Parties in a false light in order to harm and damage the Johnson Parties by interfering with advantageous contractual and business relationships and by breach of statutory duties.

B. FACTUAL BASIS OF THIRD PARTY COMPLAINT.

The State has alleged that various claims relating to activities associated with the improvement of grazing lands regarding King and La Osa Ranches. Specifically, the State has alleged that in connection with these clearing activities, the Third Party Plaintiffs illegally trespassed on State land, destroyed various protected plants on State and/or private land, breached State grazing leases, and illegally discharged pollutants into navigable waters.

Third Party Plaintiffs deny any and all such allegations, and deny that any illegal, negligent, or wrongful activities took place in connection with said clearing activities. All activities alleged at least in the State's Complaint, Causes of Actions One through Sixth inclusive, were conducted by 3F Contracting. 3F Contracting was hired by King Ranch LLC to improve private pastureland for the benefit of ranching activities taken on the La Osa ranch. 3F Contracting was, at all times relevant, an independent contractor. None of the Third Party Plaintiffs nor any of their representatives oversaw, controlled, supervised or directed the operations of 3F Contracting activities. 3F Contracting was directed to only improve private pastureland, and was directed to stay off State land.

The boundary separating the private land from the State land was clearly marked, and such boundary was specifically brought to the attention of 3F Contracting representatives. It has been alleged that 3F Contracting conducted activities on land owned by the State. To the extent 3F Contracting conducted any activities on land owned by the State, such activities were in violation of its instructions, which instructions were that 3F Contracting was only to conduct activities on private land a part of the La Osa ranch.

To the extent that any illegal, negligent, or wrongful activities took place related to the La Osa Property, such activities were performed solely by 3F Contracting. Any and all damages and injuries caused by the activities alleged in Causes of Action One through Sixth inclusive in the State's Complaint were solely caused by 3F Contracting. In the event that the State or any of its departments or boards should recover any judgment against any or all of the Third Party Plaintiffs for damages or for any claims sustained arising out of the Causes of Action One through Sixth inclusive, then in that event the Third Party Plaintiffs will be entitled to a judgment against 3F Contracting for its actions and conduct.

The State has also alleged that various drilling activities were conducted on private property located in Apache County commonly referred to as "South Fork." The South Fork property was owned by Third Party Plaintiff The Ranch at Southfork, LLC. Third-party Defendant Bill Preston Well Drilling was hired to drill a well on the South Fork Property. At all times relevant, Preston was and acted as an independent contractor. None of the Third Party Plaintiffs nor any of their representatives controlled, supervised or directed the operations of the drilling activities. The State has alleged that, in connection with Preston's activities, certain well drilling fluids, cuttings, and sediments were discharged into a tributary of the Little Colorado River. To the extent that any discharges were made as a result of the drilling activities, all such discharges were solely caused by Preston. Any and all damages and injuries caused by the drilling activities alleged in the State's Complaint were solely caused by Preston.

Third Party Plaintiffs are innocent of any and all negligence, breaches, or responsibility for any damages caused by the activities taken by Preston. In the event that the State or any of its subdivisions or representatives should recover any judgment against any or all of the Third Party Plaintiffs for damages or for any claims sustained arising out Cause of Action Tenth, then in that event the Third Party Plaintiffs will be entitled to a judgment against Preston for its actions and conduct.

II. LEGAL BASIS

A. LEGAL BASIS OF COUNTERCLAIM.

The tort of defamation is generally designed to compensate for damages incurred to the reputation and good name caused by the publication of false and/or inflammatory information. The elements for defamation are as follows:

> "To create liability for defamation there must be: (a) a false and defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either action ability of the statement irrespective of special harm or the existence of special harm caused by the publication." *Restatement of Torts 2d*, §558.

The statements made by Mr. Owens, Mr. Goddard, the ADEQ, and the Attorney General's office were false, a fact known to them. Likewise, the statements were defamatory. A "communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Restatement of Torts 2d*, §559.

The statements made by the above-referenced individuals and entities imputed criminal activity on the part of the Johnson Claimants. "The publication of charges of crimes for criminal acts ... is actionable *per se*." *Roscoe v. Schoolitz*, 105 Ariz. 310, 312, 464 P.2d 333 (1970) (*en banc*). Likewise, the above-referenced individuals and entities imputed facts harmful to Plaintiffs' business dealings. "Generally, injurious falsehoods 'consist of the publication of matters derogatory to the Plaintiffs' business in general, of a kind calculated to prevent others from dealing with him or otherwise to interfere with his relations with others to his disadvantage." *Western Technologies v. Sverdrup & Parcel*, 154 Ariz. 1, 4, 739 P.2d 1318 (Div. 1, 1987). (internal citations omitted).

The statements made were likewise not privileged. Under Arizona law, agents of the State are not given an absolute privilege to defame citizens, even if such statements have a connection to pending civil enforcement actions. *See State v. Superior Court*, 186 Ariz. 294, 298, 921 P.2d 697 (Div. 1, 1996) (holding that assistant attorney general statements to the press concerning enforcement action were not protected by absolute prosecutorial immunity). *See also Buckley*

v. Fitzsimmons, 509 U.S. 259, 112 S.Ct. 2606, 125 L.Ed.2d 209 (1993) (indicating that absolute immunity does not apply to a publication of defamatory matter in a press conference, holding that "the conduct of a press conference does involve the initiation of a prosecution, the presentation of the State's case in court, or actions preparatory for these functions); *Chamberlain v. Mathis*, 151 Ariz. 551, 729 P.2d 905 (1986).

The defamatory statements made concerning the Johnson Claimants were made with malice and with knowledge that such statements were false when uttered. The Johnson Claimants supplied the above-referenced individuals and entities with substantial evidence to demonstrate their innocence, evidence which was affirmatively and was knowingly ignored by the State.

The State of Arizona, its agencies and representatives likewise disparaged the Johnson Parties in proceedings conducted before that agency and took deliberate and intentional actions which would put the Johnson Parties in a bad light. These actions were taken by a manifest dislike of the Johnson Parties and was not supported by existing rules or regulations of the agencies, but rather was based on hidden desk drawer rules and arbitrary applications of requirements that were not supported by the law.

The actions of the Counterdefendants were outside the scope of their employment, were undertaken with a reckless disregard for the lawful rights of the Counterclaimants, were intentional and wilful and were of such an outrageous nature as to give rise to punitive damages.

Additionally, in the event that the Johnson Claimants prevail in the underlying action, attorneys fees and other expenses will be claimed and shall be awarded pursuant to Ariz. Rev. Stat. Ann. § 12-348(A)(1) which states:

> "In addition to any costs which are awarded as prescribed by statute; a court *shall* award fees and other expenses to any party other than the state or a city, town or county which prevails by an adjudication on the merits in any of the following . . . A civil action brought by the state or a city, town or county against the party."

(Emphasis added).

B. LEGAL BASIS OF THIRD-PARTY COMPLAINT.

To the extent any entities related to Johnson were in any way negligent (which they were not), all such negligence was purely passive. The Johnson parties causative contribution to any loss ended upon the hiring of the independent contractor. The Johnson parties were not personally at fault for the conduct of 3F Contracting and Preston Drilling. The Third Party Plaintiffs therefore have a claim for indemnity against the contractors whose active negligence produced the loss. *See Busy Bee Buffet v. Ferrell,* 82 Ariz. 192, 310 P.2d 817 (1957); *Tucson Electric Power Co. v. Kokosing Construction Co.,* 157 Ariz. 317, 767 P.2d 40 (App. 1988); *Transmerica Insurance Company v. Trico International, Inc.,* 149 Ariz. 104, 716 P.2d 1041(App. 1985); *Chesin Construction Co. v. Epstein,* 8 Ariz.App. 312, 446 P.2d 11 (1968); *Estes Co. v. Aztec Construction, Inc.,* 139 Ariz. 166,677 P.2d 939 (App. 1983); *Employers Mutual Liability Ins. Co. v. Advance Transformer* Co., 15 Ariz.App. 1, 485 P.2d 591 (1971). *See, INA Insurance Co. v. Valley Forge Ins.* Co., 150 Ariz. 248, 722 P.2d 975 (App. 1986), *American and Foreign Ins. Co. v. Allstate Ins.,* 139 Ariz. 223, 677 P.2d 1331 (App. 1983); *Henderson Realty v. Mesa Paving Company, Inc.,* 27 Ariz.App. 299, 554 P.2d 895 (1976); and *First National Bank of Arizona v. Otis Elevator Co.,* 2 Ariz.App. 596, 411 P.2d 34 (1966). *Schweber Electronics v. National Semi-conductor Corp.,* 174 Ariz. 406, 850 P.2d 119 (App. 1992).

III. WITNESSES.

Brian Tompsett
JOHNSON INTERNATIONAL, INC.
5230 East Shea Blvd.
Scottsdale, Arizona 85254

Brian Tompsett is expected to testify concerning his general familiarity with King and La Osa Ranches and the purposes thereof. Brian Tompsett is also expected to testify concerning his dealings and relationships with 3F Contracting and its principals and his dealings and communications with representatives of Preston Well Drilling relating to Southfork Ranch. Mr. Tompsett is also expected to testify concerning the agricultural and ranching uses intended for King and La Osa Ranches. Brian Tompsett may also be expected to testify consistent with any deposition which he may give.

James F. Fleuret
3F CONTRACTING, INC.
8840 East Brilliant Sky Circle
Gold Canyon, Arizona 85218

Mr. Fleuret is expected to testify regarding his involvement at King and La Osa Ranches and his communications with representatives and owners of King and La Osa Ranches relating to that involvement. James Fleuret may also be expected to testify consistent with any deposition which he may give.

Bill Preston
BILL PRESTON WELL DRILLING
7902 East McDowell Road
Mesa, Arizona 85207

Bill Preston is expected to testify that he is the owner of and conducts business as Preston Well Drilling. He is expected to testify that he performed drilling activities at Southfork Ranch, and is expected to describe the nature and extent of those drilling activities. He is also expected to testify about his engagement to conduct drilling activities on private land in Apache County,

Arizona. Mr. Preston is expected to describe his background and experience and his communications and dealings with representatives of Southfork Ranch in connection with the drilling activities. Bill Preston may also be expected to testify consistent with any deposition which he may give.

VII. COMPUTATION AND MEASURE OF DAMAGES.

Johnson has been damaged and claims damages as follows:

- For damages incurred in an amount to be determined at trial but in no event less than
  - (I) $20,000,000 as to George H. Johnson and Jana Johnson;
  - (ii) $10,000,000.00 as to the George H. Johnson Revocable Trust;
  - (iii) $10,000,000.00 as to Johnson International, Inc.;
- For punitive damages in an amount to be determined at trial; and
- For attorney's fees and costs incurred in connection with this case.

These damages are based, in part, on loss of contracts, loss of business expectancies, loss of profits, and injury to the reputation of the Johnson Parties. These damages are ongoing, and further computation of damages will be provided as this case and further discovery unfolds.

Additionally, to the extent that the Third-Party Plaintiffs may be damaged in any way resulting from any acts or omissions of the Third-Party Defendants, Third-Party Plaintiffs are entitled to be indemnified for any and all such loss.

The information set forth in this Rule 26.1 Disclosure may be amended and/or supplemented upon further investigation and/or discovery.

DATED this 10th day of November, 2005.

MARGRAVE CELMINS WHITEMAN, P.C.

Lat J. Celmins
Michael L. Kitchen
Attorneys for Johnson Defendants and Counterclaimants

Original of the foregoing mailed this 10th day of November, 2005 to:

Terry Goddard
Attorney General
Craig Soland
Special Counsel
1275 West Washington
Phoenix, Arizona 85007

Copy of the foregoing mailed this 10th day of November, 2005 to:

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Phoenix, Arizona 85012

Barry Mitchell
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Harry L. Howe
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Scottsdale, Arizona 85253-1479

Bill Preston
BILL PRESTON WELL DRILLING
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Mesa, Arizona 85207

Marc Budoff
111 West Monroe Street, Suite 1212
Phoenix, Arizona 85003-1732

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VERIFICATION

STATE OF ARIZONA)
COUNTY OF MARICOPA) ss.

I, Brian Tompsett, Vice President of Johnson International, Inc., have read the foregoing Supplemental Disclosure Statement pursuant to Rule 26.1, Ariz. R. Civ. P. and to the best of my knowledge, information and belief, the statements made therein are true and correct based upon my review of documents and knowledge of other evidence in this case.

JOHNSON INTERNATIONAL, INC.

Brian Tompsett

Sworn to and subscribed before me this 10 day of November, 2005 by Brian Tompsett.

Notary Public

My Commission Expires: 12-23-2009

CINDY L GIBSON
Notary Public - Arizona
MARICOPA COUNTY
My Comm. Exp. 12-23-2009

ATTACHMENT 2

JUL 0 7 2005

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Attorneys for Plaintiff

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LENNAR COMMUNITIES DEVELOPMENT, INC., an Arizona corporation

Plaintiff,

vs.

SONORAN UTILITY SERVICES, L.L.C., an Arizona Limited Liability Company; GEORGE H. JOHNSON and JANE DOE JOHNSON, husband and wife; BOULEVARD CONTRACTING COMPANY, INC., an Arizona corporation; PINAL COUNTY BOARD OF SUPERVISORS, a political subdivision of the State of Arizona; LIONEL D. RUIZ, in his capacity as a member of the Pinal County Board of Supervisors; SANDIE SMITH, in her capacity as a member of the Pinal Board of Supervisors; DAVID SNIDER, in his capacity as a member of the Pinal Board of Supervisors; JIMMIE KERR, in his capacity as a former member of the Pinal County Board of Supervisors; THE 387 WATER IMPROVEMENT

Case No.: CV2005-002548

COUNTERCLAIMANTS' RESPONSE TO GEORGE H. JOHNSON'S COUNTERCLAIM

(Assigned to the Honorable Ruth H. Hillard)

JUL - 6 2005

4/05 Jonpsett

DISTRICT, a Pinal County Improvement District and a political subdivision of the State of Arizona; THE 387 WASTEWATER IMPROVEMENT DISTRICT, a Pinal County Improvement District and a political subdivision of the State of Arizona,

Defendants.

GEORGE H. JOHNSON, a married man

Counterclaimant,

vs.

LENNAR COMMUNITIES DEVELOPMENT, INC. an Arizona corporation; LENNAR CORPORATION, a Delaware corporation; ALAN JONES and JANE DOE JONES, husband and wife; MARK BITTEKER and JANE DOE BITTEKER, husband and wife; JOHN SUTHERLAND and JANE DOE SUTHERLAND, husband and wife; JOHN DOES and JANE DOES 1-X; ABC PARTNERSHIPS I-X; ABC LIMITED LIABILITY COMPANIES; XYZ CORPORATIONS I-X,

Counterdefendants.

Counterclaimants, for their response to George Johnson's Counterclaim, state and allege as follows:

1. Counterdefendants are without sufficient information upon which to form a belief as to the truthfulness of Paragraph 1 and, therefore, deny same.

2. In response to Paragraphs 2 and 3 of Johnson's Counterclaim, Counterdefendants admit that Lennar Corporation is a Delaware corporation located in

Miami, Florida. Lennar Communities Development, Inc. is a division of Lennar Corporation and is authorized to do business within the State of Arizona and is currently doing business in Maricopa and Pinal counties. The Counterdefendants deny the remaining allegations of the Paragraphs 2 and 3 of the Counterclaim.

3. In responding to Paragraph 4 of Counterclaim, Counterdefendants admit that Alan Jones and Jodie Jones are husband and wife and that they reside within Maricopa County, Arizona, but deny the remaining allegations contained therein.

4. In responding to Paragraph 5 of the Counterclaim, Counterdefendants admit that Mark Bitteker and Tamara Bitteker are husband and wife and reside within Maricopa County, Arizona, but deny the remaining allegations contained therein.

5. In responding to Paragraph 6 of the Counterclaim, Counterdefendants admit that John Sutherland resides in Maricopa County, Arizona, but deny the remaining allegations contained therein.

6. Counterdefendants are without sufficient information upon which to form a belief as to the truthfulness of Paragraph 7 and, therefore, deny same.

7. Counterdefendants admit the allegations contained in Paragraphs 8, 9, 10, and 11.

8. Counterdefendants admit the allegations contained in Paragraph 12.

9. Counterdefendants are without sufficient information upon which to form a belief as to the truthfulness of Paragraphs 13 and 14, and therefore, deny same.

10. Counterdefendants admit the allegations contained in Paragraph 15 of Johnson's Counterclaim.

11. In response to Paragraph 16 of Johnson's Counterclaim, Counterdefendants admit that Pinal County Board of Supervisors, as the Board of Directors for the the 387 Districts, advertised for proposals from utility service providers to be the service provider for the 387 Districts, but Counterdefendants deny the sufficiency of those advertisements and the remaining allegations contained in Paragraph 16.

12. Counterdefendants admit the allegations contained in Paragraph 17 of Johnson's Counterclaim.

13. Counterdefendants admit the allegations contained in Paragraph 18 of Johnson's Counterclaim.

14. In response to Paragraphs 19 and 20 of Defendant's Counterclaim, Counterdefendants allege that the document described therein was attached as Exhibit A to the First Amended Complaint and speaks for itself. Counterdefendants deny any other remaining allegations contained therein.

15. Counterdefendants admit the allegations contained in Paragraph 21 of Johnson's Counterclaim.

16. In response to Paragraphs 22 and 23 of Johnson's Counterclaim, Counterdefendants allege that that the document described therein was attached as Exhibit B to the First Amended Complaint and speaks for itself. Counterdefendants deny the remaining allegations contained therein.

17. Counterdefendants are without sufficient information upon which to form a belief as to the allegations contained in Paragraph 24 and, therefore, deny same.

18. Counterdefendants are without sufficient information upon which to form a belief as to the truthfulness of the allegations contained in Paragraphs 25 and 26 and, therefore, deny same.

19. In response to Paragraph 27 of Johnson's Counterclaim, Counterdefendants admit that Lennar either was under contract to purchase a real property or was the owner of the subject property within the 387 Districts, but deny any remaining allegations not specifically admitted to herein.

20. In response to Paragraph 28 of Johnson's Counterclaim, Counterdefendants admit that Lennar intended to develop the real property for residential purposes, but deny any remaining allegations not specifically admitted to herein.

21. Counterdefendants deny the allegations contained in Paragraph 29 of Johnson's Counterclaim.

22. In response to Paragraph 29(a) of Johnson's Counterclaim, Counterdefendants deny the allegations contained therein.

23. In response to Paragraph 29(b) of Johnson's Counterclaim, Lennar admits that it requested to be de-annexed from the Districts after Johnson and Sonoran's breaches of the Master Utility Agreement entered into with Lennar and Johnson and Sonoran's refusal to put up financial assurances as required under the Water Supply Agreement and Wastewater Supply Agreement, but denies any attempts to break up the Districts. Lennar denies the remaining allegations contained in Paragraph 29(b).

24. Counterdefendants deny the allegations contained in Paragraph 29(c) of Johnson's Counterclaim.

25. Counterclaimants deny the allegations contained in Paragraph 29(d) of the Counterclaim.

26. In response to Paragraph 29(e) of Johnson's Counterclaim, Lennar admits that after Sonoran and Johnson's defaults under the agreements with both Lennar and the 387 Districts and Sonoran's failure to make sufficient progress on the wastewater treatment plant and failure to post financial assurances, Lennar contacted the 387 Districts to enlist its aid in ensuring that Sonoran and Johnson performed under the agreements with the 387 Districts and Lennar. When Sonoran and Johnson's breaches under the agreements were not remedied, Lennar attempted to be de-annexed from the District because it lost confidence that Sonoran and/or Johnson would be able to perform under the agreements and requested the District to take action. Lennar admits that correspondence was sent to the Environmental Protection Agency because Johnson was attempting to wrongfully expand his CAAG 208 permit to include property against the property owners' wishes that Sonoran and/or Johnson had no right to serve. Counterdefendants deny the remaining allegations contained therein.

27. In response to Paragraph 29(f) of Johnson's Counterclaim, Counterdefendants deny the allegations contained therein.

28. In response to Paragraphs 30 and 31 of Johnson's Counterclaim, Counterdefendants deny the allegations contained therein.

29. In response to Paragraphs 32 and 33 of the Counterclaim, Counterdefendant Jones admits that after Sonoran and Johnson's defaults under the Sonoran Management Services Agreement with Lennar and its defaults under the agreements with the 387 Districts, and upon Johnson and Sonoran's attempts to wrongfully include property against

the property owners' wishes in an attempted expansion of the Districts, Jones stated that Lennar did not want its property interest to be included in any future expansion of the District and that any attempts to expand the 387 Districts to include Lennar's property interest was inappropriate. Counterdefendants deny the remaining allegations contained in Paragraphs 32 and 33 of the Counterclaim.

30. Counterdefendants deny the allegations contained in Paragraph 34.

31. In response to Paragraph 35 of the Counterclaim, Jones admits that it was a conflict of interest for Conley Wolfswinkle, a major landowner (or controller of a large portion of land) in the 387 Districts, to be an owner of Sonoran Utilities. Counterdefendants deny the remaining allegations contained therein.

32. In response to Paragraph 36 of Johnson's Counterclaim, Jones admits that after the meeting where Johnson stated that Conley Wolfswinkle, a majority landowner (or controller of a large portion of land) in the 387 Districts, was always part of Sonoran Utilities, that third parties were advised that this was a conflict of interest. Counterdefendants deny the remaining allegations contained therein.

33. Counterdefendants deny the allegations contained in Paragraph 37 of the Counterclaim.

34. Counterdefendants deny the allegations contained in Paragraphs 38, 39, 40, 41, 42, 43 and 44 of Johnson's Counterclaim.

35. Counterdefendants deny the allegations contained in Paragraphs 45, 46, 47, 48, 49, and 50.

36. Paragraph 51 simply incorporates prior allegations of Johnson's Counterclaim and, therefore, Counterdefendants respond to those incorporated portions in the same manner as previously stated.

37. Counterdefendants are without sufficient information upon which to form a belief as to the truthfulness of the allegations contained in Paragraph 52 of Johnson's Counterclaim and, therefore, deny same.

38. Counterdefendants deny the allegations contained in Paragraphs 53, 54, 55, 56, 57, and 58.

39. Counterdefendants deny each and every allegation that is not otherwise admitted herein.

AFFIRMATIVE DEFENSES

Counterdefendants allege the following affirmative defenses:

1. Counterdefendants incorporate by reference any and all claims and allegations set forth in its First Amended Complaint.

2. Counterdefendants allege that they did not interfere with any business expectancies, contract, or any other matter.

3. Johnson's counterclaim fails to state a claim upon which relief can be granted.

4. Counterclaimant repudiated the subject contracts prior to any alleged "interference" and, therefore, cannot now sue for the benefit he may have received thereunder.

5. Counterclaimant waived any claim to damages.

6. Johnson is estopped from bringing any claim against Counterdefendants due to his inequitable conduct.

7. Johnson's claims are barred pursuant to the doctrine of unclean hands.

8. Johnson's claims are barred by waiver.

9. Johnson's claims are barred by failure of consideration.

10. Counterdefendants further allege the following defenses: set off, recoupment, fraud, illegality, payment, accord and satisfaction, contributory negligence, duress, release, license, lack of condition precedent, repudiation, anticipatory breach of contract, rescission, statute of frauds and statute of limitations.

11. Counterdefendants allege any and all other affirmative defenses set forth in Rule 8 and 12(b) of the Arizona Rules of Civil Procedure that discovery may reveal to be applicable.

WHEREFORE, having fully answered Johnson's Counterclaim, Counterdefendants request that this court enter its order as follows:

1. Granting judgment in favor of Counterdefendants and dismissing Johnson's counterclaim with prejudice;

2. Awarding Counterdefendants their attorneys' fees and costs pursuant to Arizona Revised Statutes §12-341.01; or otherwise

3. For such further and such other relief as the court just and proper.

DATED this 5th day of July, 2005.

BEUS GILBERT PLLC

By Linnette Flanigan

Leo R. Beus
Britton M. Worthen
Linnette R. Flanigan
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Attorneys for Plaintiff

Copy of the foregoing hand-delivered this 5th day of July, 2005 to:

Honorable Ruth Hilliard
Maricopa County Superior Court
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Phoenix, AZ 85003

Copy of the foregoing mailed this 5th day of July, 2005 to:

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JAMES M. JELLISON, ESQ. #012763
Attorneys for the Pinal County and 387 Districts Defendants

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LENNAR COMMUNITIES DEVELOPMENT, INC., an Arizona corporation,

Plaintiff,

vs.

SONORAN UTILITY SERVICES, L.L.C., an Arizona limited liability company; GEORGE H. JOHNSON and JANE DOE JOHNSON, husband and wife; BOULEVARD CONTRACTING COMPANY, INC., an Arizona corporation; PINAL COUNTY BOARD OF SUPERVISORS, a political subdivision of the State of Arizona; LIONEL D. RUIZ, in his capacity as a member of the Pinal County Board of Supervisors; SANDIE SMITH, in her capacity as a member of the Pinal County Board of Supervisors; DAVID SNIDER, in his capacity as a member of the Pinal County Board of Supervisors; JIMMIE KERR, in his capacity as a former member of the Pinal County Board of Supervisors; THE 387 WATER IMPROVEMENT DISTRICT, a Pinal County Improvement District and a political subdivision of the State of Arizona; THE 387 WASTEWATER IMPROVEMENT DISTRICT, a Pinal County Improvement District and a political subdivision of the State of Arizona,

Defendants.

CASE NO. CV2005-002548

REPLY IN SUPPORT OF MOTION TO DISMISS

(Oral Argument Requested)

SEP - 2 2005

Defendants Pinal County Board of Supervisors, Lionel D. Ruiz, Sandie Smith, David Snider, Jimmie Kerr, the 387 Water Improvement District, and the 387 Wastewater Improvement District (collectively, the "Pinal County and 387 Districts Defendants"), by and through counsel, and pursuant to Ariz. R. Civ. P. 12(b)(1)(2)&(6), hereby submit their Reply in support of their Motion To Dismiss Plaintiff's Complaint against them. In its response, Plaintiff acknowledges that it has not named Pinal County as a defendant and does not seek punitive damages against the Pinal County and 387 Districts Defendants. Plaintiff continues to assert claims against the Pinal County Board of Supervisors individually, but cannot show a notice of claim that names any individual Supervisor as the potential target of any claim. The Notice of Claim that Plaintiff provided to the 387 Districts Defendants was not within 180 days of the time the claims accrued. Finally, Plaintiff has failed to state cognizable claims against the Pinal County and 387 Districts Defendants. For all these reasons, the Pinal County and 387 Districts Defendants respectfully request that the Court grant their Motion To Dismiss.[1]

This Motion is supported by the accompanying Memorandum of Points and Authorities which is incorporated herein by this reference.

DATED this 1st day of September, 2005.

SCHLEIER, JELLISON & SCHLEIER, P.C.

By_____
James M. Jellison
Attorneys for the Pinal County and 387 Districts Defendants

[1] The Pinal County and 387 Districts Defendants also believe it is proper, and request, that this Court rule on their Motion For Change Of Venue first. If venue is changed, the Pinal County and 387 Districts Defendants assert that a ruling on this Motion would be properly decided upon by the judge newly assigned by the Pinal County Superior Court.

MEMORANDUM OF POINTS & AUTHORITIES

I. PLAINTIFF ACKNOWLEDGES THAT IT HAS NOT SUED PINAL COUNTY AND IS NOT ENTITLED TO PUNITIVE DAMAGES FROM EITHER THE PINAL COUNTY OR 387 DISTRICTS DEFENDANTS.

Plaintiff acknowledges that it is not suing Pinal County, a political subdivision of the state, and is not entitled to punitive damages against the individual Pinal County Board of Supervisors or the 387 Districts.

II. PLAINTIFF HAS NOT DEMONSTRATED A NOTICE OF CLAIM WHICH PRESENTS ANY CLAIM AGAINST THE INDIVIDUAL SUPERVISORS.

Although Plaintiff acknowledges that it has not stated any claim against Pinal County, it continues to assert claims against the individual members of the Pinal County Board of Supervisors. Plaintiff's claims against the individual Supervisors must fail because there is no notice of claim which presents an actual claim against any individual Supervisor.

Plaintiff admits that all of its previous notices, whether they be the notices of default or the September 15, 2004 Notice of Claim, were directed at the 387 Districts themselves or the conduct of the 387 Districts' water and wastewater treatment contractors. *See* Response to Motion To Dismiss p. 5, lls. 16; p. 6, lls. 4 – 6; p. 7, lls. 4 – 12. There is not a single notice of default or notice of claim that asserts a liability claim against any individual person, much less any individual member of the Pinal County Board of Supervisors.

Despite Plaintiff's assertions, *Crum v. Superior Court*, 186 Ariz. 351, 353, 922 P.2d 316, 318 (App. 1996) controls the outcome of this issue: "[a] claimant who asserts that a public employee's conduct giving rise to a claim for damages was committed within the course and scope of employment must give notice of the claim to ***both*** the employee individually and to his employer."

A member of a county board of supervisors is, without doubt, a "public employee" for purposes of the notice of claim statute. A.R.S. §12-820(5) defines "public employee" as "an employee of a public entity." A.R.S. §12-820(1) defines the term "employee" broadly to include

"an officer, director, employee, or servant, whether or not compensated or part time, who is authorized to perform any act or service, except that employee does include an independent contractor." The individual supervisors are officers and directors who are authorized by statute to perform acts or services on behalf of the various counties. A.R.S. §11-201, *et. seq.* By failing to serve a notice of claim naming individual supervisors as potential defendants, Plaintiff has defeated the purpose of the notice of claims statute by depriving those individuals of the opportunity to evaluate and resolve potential claims against them *prior to* litigation.

Having failed to serve individual notices of claim on the named Supervisors, Plaintiff's claims directed as those individual Supervisors must be dismissed.

III. THE INDIVIDUAL PINAL COUNTY SUPERVISORS CANNOT BE HELD LIABLE FOR ANY ALLEGED FAILURE OF THE 387 DISTRICTS TO PROVIDE WATER OR WASTEWATER SERVICES.

Although the Pinal County Board of Supervisors was involved in the *creation* of the 387 Districts, it does not *control* the Districts. Rather, the 387 Districts are supervised by a separate Board of Directors for the Districts. A.R.S. §48-908. While the actual people who serve as the Pinal County Board of Supervisors are the same people as the Board of Directors of the Districts, the separation of identity, as a matter of law, prevents an individual member of the Board of Supervisors from being liable for any alleged failure of the 387 Districts. This principle was recognized quite clearly in *Hancock v. Carroll*, 188 Ariz. 492, 498, 937 P.2d 682, 688 (App. 1997). In *Hancock* the court determined whether a county board of supervisors could take any effective action in regard to a properly-formed stadium district, even where the same persons acted as the board of supervisors and board of directors. In determining that the acts of a county board of supervisors are complete and distinct from the acts of a board of directors of another entity, the court held as follows:

> "The business of a stadium district is not the business of the county in which it is located once a stadium district is 'organized' pursuant

> to A.R.S. §48-4203 (Supp. 1996). Repeal of a resolution creating a stadium district cannot be characterized as 'necessary or proper to carry out the duties, responsibilities and functions of the county.' A.R.S. §11-251.05(A)(1) (Supp. 1996). These duties are set forth in A.R.S. §11-251 to 269.02 (Supp. 1996) and include no authority to conduct the affairs of a stadium district. Such action would be in conflict with the legislative intent that once a stadium district has been established as a separate political subdivision of the state, all of its business is conducted by its own board of directors, not the board of supervisors of a county. We recognize that the same people sit on both the county board of supervisors and the stadium district board of directors. Nevertheless, the county and the stadium district are distinct legal entities and must be considered as such."

The same principles apply here. A.R.S. §11-264 does not allow for the Pinal County Board of Supervisors to exercise any statutory authority to "purchase, construct, or operate a sewage system." All actions taken after the Districts were formed are performed exclusively by the Districts' respective Boards of Directors, even if those persons are the same persons as the Board of Supervisors. *See* A.R.S. §48-908. In this case, no individual member of the Board of Directors of the Districts has been sued in that capacity.

Accordingly, any individual member of the Pinal County Board of Supervisors is not a proper defendant in this case.

IV. THE SEPTEMBER 15, 2004 NOTICE OF CLAIM IS UNTIMELY.

"A cause of action accrues when a "plaintiff discovers or by the exercise of reasonable diligence should have discovered that he or she has been injured by a particular defendant's negligent conduct." *Young v. City of Scottsdale*, 193 Ariz. 110, 114, 970 P.2d 942, 946 (App. 1999); ***see also*** A.R.S. §12-821.01(B). When that "particular defendant" is a public entity, official, or employee, then that "discovery" triggers the obligation to file an A.R.S. §12-821.01 notice of claim within 180 days "after the cause of action accrues."

The crux of Plaintiff's claims against the 387 Districts is that they failed to exercise the appropriate level of care in ensuring that its contractor, Sonoran, timely constructed facilities for

the provision of water and wastewater services within the District, timely obtained necessary permits for same, and timely and properly posted a performance bond. (See, Amended Complaint, paragraphs 53, 54, 87, 88, 91, 92). The following facts come directly from Plaintiff's own allegations. As early as July, 2003, Plaintiff sought alternative utility services and de-annexation from the 387 Districts as a result of Sonoran's lack of progress on the facilities, Sonoran's failure to enter into a utility agreement with Plaintiff, and the exclusion of Plaintiff from the negotiation of the service agreements between the 387 Districts and Sonoran. (Amended Complaint, paragraphs 51 – 57). On October 27, 2003, Plaintiff entered into a Master Utility Agreement for Water and Wastewater Facilities with Defendant Sonoran. (Amended Complaint, paragraph 65). The Master Utility Agreement provided that the first phase of the wastewater treatment facility would be operational by May 15, 2004 and that Sonoran would obtain a performance and payment bond. (Amended Complaint, paragraphs 67 – 71). On January 15, 2004, Plaintiff agreed to a 90-day extension for first phase construction to August 15, 2004. (Amended Complaint, paragraph 78). On March 15, 2004, Plaintiff provided Sonoran with a Notice of Default under the Master Utility Agreement because Sonoran had not posted a performance and payment bond, had failed to obtain an Aquifer Protection Permit, had not met the facilities construction scheduled, and its failure to perform created serious doubts regarding the August 15, 2004 first phase completion dates. (Amended Complaint, paragraphs 84 – 89). As of March 15, 2004, Plaintiff had already been damaged by Sonoran's conduct through the cancellation of a $3.96 million escrow. (Amended Complaint, paragraph 89).

Yet, Plaintiff, by its own allegations, failed to provide a notice of claim until after the 180 day period provided for by statute. It is important to keep in mind that Plaintiff claims that the District breached various duties by allegedly not requiring its contractor to post bonds, by condoning conflicts of interest, by failing in customer service functions, by failing to repeatedly meet construction deadlines, and not removing the contractor well before the last construction

deadline. All of these things were known on or prior to March 15, 2004 by Plaintiff's own admissions. Accordingly, the ultimate September, 2004 notice of claim simply came too late and Plaintiff can no longer maintain its claims against the Pinal County and 387 Districts Defendants.

IV. PLAINTIFF HAS FAILED TO DISCLOSE ANY VALID LEGAL AUTHORITY SUPPORTING A FIDUCIARY DUTY BETWEEN A PUBLIC UTILITY AND A CUSTOMER OF THAT UTILITY.

As the Pinal County and 387 Districts Defendants noted in their original Motion, public utility providers do not owe a fiduciary duty to individual rate-payers within the territory that the utility serves. *See Wilson v. Harlow*, 145 P.U.R. 4th 512, 860 P.2d 793 (Okla. 1993). Again, without the existence of the fiduciary duty, as a matter of law, Plaintiff's Count VII fails to state a claim upon which relief may be granted.

In its Response, Plaintiff offers no case to suggest that a utility provider should be required to observe a fiduciary duty toward the persons receiving those utility services. Plaintiff first cites to *FDIC v. Jackson*, 133 F.3d 694, 703 (9th Cir. 1998) which merely holds that "a corporate director is a fiduciary of the corporation." This unremarkable legal proposition has no application to the present case. Plaintiff is a property developer. The 387 Districts Defendants are a provider of water and wastewater service pursuant to specific statutory authorization. The Plaintiff is not a shareholder, director, supervisor, member, officer, or employee of the 387 Districts Defendants. Plaintiff is merely the recipient of services for the property that it may own within district boundaries. Likewise, Plaintiff's citation to *Atkinson v. Marquart*, 112 Ariz. 304, 306, 531 P.2d 556, 558 (1975) has no applicable here. In *Atkinson*, the court merely recited the *Jackson* proposition that a corporate director owes a fiduciary duty to his or her corporation. Finally, Plaintiff directs this Court to *Cohen v. Kite Hill Community Ass'n*, 142 Cal.App.3d 642, 191 Cal.Rptr. 209 (1983). In *Cohen*, the court reiterated a California rule that homeowner's associations owe a fiduciary duty to members because they are contractually tasked by those same

members with handling a wide array of services including maintenance and repair of utilities, lighting, sanitation, enforcement of zoning ordinances, and the like. Additionally, homeowner's associations are comprised and governed by their own members. A government run public utility is not the same. The 387 Districts are obligated to provide discrete services in the areas of water and wastewater and their customers are not member or directors of the districts. Indeed, in its Response, Plaintiff makes the bald assertion that landowners within the Districts "occupy a position of ownership analogous to the ownership of a corporation to its stockholders." *See* Response, p. 13, lls. 8 – 11. There is nothing in the enabling statutes for such districts that even approximates such a position. A.R.S. §48-901, *et. seq.*

The rule urged by Plaintiff – that a governmental utility owes a fiduciary duty to customers – is an extension of fiduciary principles that is not merited by the law and which may have a wide-ranging impact on governments and utility providers. Often times, a public utility within a portion of this State, whether the utility is governed by a private company, quasi-public entity, or governmental entity, will be the only provider of a given service. A determination that the relationship between a utility and its customers is a fiduciary one will have wide ranging impact and a potential for substantially increased litigation between a multitude of service providers and an even greater multitude of citizens. The Pinal County and 387 District Defendants urge this Court to refrain from recognizing a cause of action that is not merited by the law, which will require sweeping changes in the manner in which utilities are administered, and which could create a substantial wave of litigation.

V. PLAINTIFF HAS FAILED TO DISCLOSE ANY VALID LEGAL AUTHORITY THAT AN ALLEGED VIOLATION OF REGULATORY STATUTES REGARDING A PUBLIC UTILITY CAN BE RELIED UPON TO CREATE A STATUTORY-BASED CIVIL TORT CLAIM.

In Count VIII of the Amended Complaint, Plaintiff attempts to turn alleged breaches of statutory duties into claims for tort liability. While breaches of certain statutory mandates may give rise to tort liability, those cited by Plaintiff are not among them.

Again, none of the cases cited by Plaintiff shed light on whether the statutory duties in relation to a utility governed by a public entity support tort causes of action. The case that Plaintiff cites which comes closest to analyzing whether violations of a statutory scheme can give rise to tort claims is *Thomas v. Goudreault*, 163 Ariz. 159, 786 P.2d 1010 (App. 1990). In that case, the court held that violations of the Residential Landlord and Tenant Act can give rise to a tort cause of action. *Id.* In so concluding, the court was impressed, foremost, by the fact that the Act itself "provides a tenant, a landlord or another aggrieved party" with "'damages' or 'actual damages' for violations of different sections of the Act." In this case, Plaintiffs rely on a series of statutes that do not provide any remedy for statutory breach.

Plaintiff ignores entirely the fact that A.R.S. §48-909 lists the activities that an improvement district "may" undertake in the public interest or for public convenience. The statute does not protect against any specified harm and does not exist for the "protection and safety of the public." *See Alaface v. National Inv. Co.*, 181 Ariz. 586, 892 P.2d 1375 (App. 1994).

Plaintiff also ignores that the other source of statutory breach, A.R.S. §48-925, only provides that the "contractor shall, before executing the contract, file with the superintendent such bond or bonds as required under the provisions of title 34, chapter 2, article 2." Title 34, chapter 2, article 2, [A.R.S. §34-221] is the statute that sets forth the procedural aspects of public construction projects, including the bonding and security related to public construction projects. This specific statute is for the protection of the public entity involved in the contracting; it does not exist for the "protection and safety of the public." *See Alaface, supra.*

Plaintiff has not, and cannot, demonstrate that the statutory provisions cited by Plaintiff in the Amended Complaint are designed to protect classes of persons from particular hazards, rather than merely providing for the general operation and maintenance of improvement districts.

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VI. CONCLUSION.

For all the foregoing reasons, the Pinal County and 387 Districts Defendants respectfully request that this Court dismiss Plaintiff's Complaint.

DATED this 1st day of September, 2005.

SCHLEIER, JELLISON & SCHLEIER, P.C.

By_____
James M. Jellison
Attorneys for Pinal County and 387 Districts Defendants

ORIGINAL and One Copy of the foregoing filed this 1st day of September, 2005, with:

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Maricopa County Superior Court
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COPY of the foregoing hand delivered this 1st day of September, 2005 to:

The Honorable Ruth H. Hilliard
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Phoenix, Arizona 85003

COPY of the foregoing mailed this 1st day of September, 2005 to:

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LENNAR COMMUNITIES DEVELOPMENT, INC., an Arizona corporation, Plaintiff, vs. SONORAN UTILITY SERVICES, L.L.C., an Arizona limited liability company, et al., Defendants.	Case No.: CV2005-002548 **PLAINTIFF'S RESPONSE TO DEFENDANT SONORAN'S MOTION TO DISMISS** (Assigned to the Honorable Ruth H. Hilliard) **(Oral Argument Requested)**

Plaintiff Lennar Communities Development, Inc. ("Lennar") hereby submits its Response to Defendant Sonoran's Motion to Dismiss. Defendant Sonoran's Motion to Dismiss is meritless and, therefore, should be denied. This Response is supported by the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In its Motion to Dismiss, Defendant Sonoran Utilities, LLC ("Sonoran") attempts to invoke the statute of limitations of the notice of claim statute as a basis for dismissing Lennar's claims against it. Sonoran's Motion is baseless. Neither Lennar nor any other entity

with claims against Sonoran was or is required to file a notice of claim with Sonoran prior to initiating a lawsuit against it. The statutory provisions requiring the filing of a notice of claim apply only to a public entity or public employee. Sonoran is neither a public entity nor a public employee and, therefore, the statute is not applicable to it. In fact, Sonoran's own contract with the water and wastewater improvement district specifically provides that it is neither an employee nor an agent of the water and wastewater improvement district.

II. FACTUAL BACKGROUND.

After entering into a contract to purchase unimproved real property for the purpose of erecting residential homes on the property in an area of Maricopa that did not have water or wastewater treatment services, Lennar and the other landowners in the area began to negotiate with utility providers regarding the provision of water and wastewater services to the subject property and surrounding areas. (Plaintiff's First Amended Complaint, "FAC" 13, 14-16). After determining that existing utility providers were not attractive options because they were owned by a substantial landowner in the subject area, Lennar and the other landowners looked into forming an improvement district. (FAC 16,17).

In reliance upon promises and representations made by George Johnson ("Johnson"), the manager of Sonoran, and Sonoran regarding forming an improvement district, Lennar (through its seller) and the other landowners signed petitions requesting the establishment of a domestic water and wastewater improvement district with "qualified electors of the proposed district" making up the five-member Board of Directors of the improvement district. (FAC 4, 17-29).

Shortly thereafter, Johnson advised Lennar and the other area landowners that new

petitions to form the district would need to be signed. The new petitions provided for the Board of Supervisors to be the Board of Directors for the district and effectively removed Lennar and the other landowners' ability to serve on the Board of Directors of the improvement district. (FAC 30). In order to secure Lennar and the other landowners' signatures on the new petitions to form the improvement district, Johnson made additional promises and representations that he had no intention of honoring. In reliance upon the representations, promises and fraudulent omissions, Lennar, through its seller, signed off on the modified petitions to create the improvement districts. (FAC 31-38).

The 387 Water and Wastewater Improvement Districts ("the Districts") were established on May 21, 2003 in order to secure provision of water and wastewater utility services to the subject area. (FAC 7, 39). The Districts chose Sonoran to be the utility provider for the Districts and entered into a Water Supply and Management Services Agreement with Sonoran. (FAC 42-44 & Exh. A). The Water Supply Agreement required Sonoran to provide water delivery services to all residential and commercial properties within the area and to "construct... wells, pumps, storage, water treatment plant(s), transmission and distribution lines, valves, services and meters... necessary to supply water within the district....". (FAC 45 & Exh. A).

The Districts also entered into a Wastewater Treatment Collection and Management Services Agreement ("Wastewater Treatment Agreement") with Defendant Sonoran on June 25, 2003. (FAC ¶ 46 & Exh. B). The Wastewater Treatment Agreement required Sonoran to provide wastewater services to all property owners within the area and [to] construct a "wastewater collection system consisting of all wastewater treatment plant(s), transmission

and collection lines, lift stations, pumps, valves, connections, storage and disposal facilities . . . necessary to collect, treat and dispose of all wastewater flows originating within the district....." (FAC 48 & Exh. B).

Sonoran's Water Supply and Wastewater Treatment Agreements with the Districts were 30-year renewable management agreements which granted Sonoran the right to own, manage and operate certain water and wastewater utility facilities on behalf of the Districts within Pinal County. (FAC 49).

Lennar subsequently entered into a Master Utility Agreement for Water and Wastewater Facilities ("Master Utility Agreement") with Sonoran on October 27, 2003, which granted Sonoran the right to provide water and wastewater treatment services to the property. (FAC 65, 66). In the Master Utility Agreement, the parties set forth a construction schedule that included a requirement that the first phase of the wastewater treatment plant was to be operational on or before May 15, 2004. (FAC 67-70). The Master Utility Agreement required Sonoran to post a Performance and Payment Bond within fifteen days after execution of the agreement. (FAC 71). Additionally, the Master Utility Agreement included requirements that Sonoran take all actions necessary to assist Lennar in obtaining regulatory approvals and provide the necessary assurances. (FAC 71, 72). On January 15, 2004, Lennar granted Sonoran and Johnson an extension to complete the Phase I construction. (FAC 78). The first phase of wastewater treatment plant was now required to be operational by August 15, 2004. (*Id.*)

Despite the specific requirements in the parties' agreement, Johnson failed to post bonds, failed to obtain the necessary permits during the time agreed upon, and failed to meet

the construction schedule. (FAC 84-87).

On March 15, 2004, Lennar sent Johnson and Sonoran a Notice of Default regarding Sonoran's failure to begin construction on the facility, failure to timely post bond, and failure to timely obtain the Aquifer Protection Permit. (FAC 87 & Exh. L). A copy of the Notice of Default was also sent to the Districts' Board of Directors and the Pinal County Attorney's Office. Sonoran failed to cure the defaults. (FAC 90).

On March 25, 2004, Lennar notified the Board of Supervisors, the Pinal County Manager, and the Pinal County Attorney about Johnson and Sonoran's defaults and that Sonoran and Johnson failed to cure the defaults despite being given Notice. (FAC 91, 92 & Exh. H). Lennar similarly advised the Board of Supervisors and the Districts that Johnson and Sonoran were in default under the Districts' Agreements with Sonoran and that these defaults were threatening Lennar's current investment and expenditures. (FAC 93 & Exh. H). Lennar requested the Districts and Board of Supervisors to take action to remedy the defaults, namely "to remove Sonoran as the manager/operator of the Districts and replace Sonoran with a competent, qualified, adequately funded operator who does not have an interest in any property located within the District." (FAC 94 & Exh. H). The Districts and Board of Supervisors did nothing to insure that Sonoran and Johnson cured their defaults nor did it take any action in response to Lennar's request to remove Sonoran as the manager/operator of the Districts. (FAC 98).

Nonetheless, on March 30, 2004 Lennar again notified the Districts and the Board of Supervisors of the continued defaults by Johnson and Sonoran and demanded that the Board of Supervisors terminate the Management Services Agreement with Defendants Johnson and

Sonoran as a result of the defaults. (FAC 99, 100 & Exh. N). Defendants failed to act on Lennar's request and failed to control the situation and ensure the defaults were cured. (FAC ¶ 101).

Sonoran and Johnson continued to default under their agreement with Lennar by failing to cooperate with Lennar in timely signing forms for Lennar to obtain the necessary governmental approvals and the 100-year Certificate of Assured Water and further failed to provide necessary information required by regulatory agencies for Lennar to achieve final approval for the water certificate causing Lennar's plats to not be timely approved. (FAC 102, 103). Defendants Sonoran and Johnson also failed to complete construction and have the Phase I facilities operational by August 15, 2004. (FAC 104).

III. LEGAL ARGUMENT.

"Motions to dismiss for failure to state a claim are not favored under Arizona law." *State ex rel Corbin v. Pickerell*, 136 Ariz. 589, 594, 667 P.2d 1304, 1309 (1983) (citing *Maldonaldo v. Southern Pac. Trans. Co.*, 129 Ariz. 165, 167, 629 P.2d 1001, 1003 (App. 1981)). In order to prevail under Rule 12(b)(6), Ariz.R.Civ.P., the defendant must show "beyond doubt that the plaintiff can prove no set of facts in support of his claim." 2 Moore's Federal Practice § 1234[1][a] quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). "[I]n consideration of a motion to dismiss for failure to state a claim, facts alleged in the Complaint are ***assumed to be true*** and are ***treated in the light most favorable to the plaintiff***. *Thornton v. Marsico*, 5 Ariz.App. 299, 425 P.2d 869 (App. 1967); *see also Sierra Madre Dev., Inc. v. Via Entrada Townhouses Ass'n*, 514 P.2d 503 (App. 1973).

A. **Sonoran Is Not A Public Entity And Is Not Entitled to A Notice of Claim**

Sonoran's blanket assertion, without any legal support, that it is entitled to the protections of Ariz. Rev. Stat. §12-821.01 is misplaced. Arizona Revised Statute § 12-821.01 provides as follows:

> A. Persons who have claims against a **public entity** or a **public employee** shall file claims . . . within 180 days after the cause of action accrues.

A public entity is defined as the "state or any political subdivision of this state." Ariz. Rev. Stat. §12-820. A public employee is defined as an "employee of a public entity". *Id.* The "State" is defined as "any state agency, board, commission or department." *Id.*

Defendant Sonoran is neither the state nor any political subdivision of the state. Sonoran is a limited liability company owned and managed by private individuals and has absolutely no ownership by the state nor is any political subdivision of the state. Sonoran is merely a private company that contracted with the Districts to provide utility services. This contractual relationship does not bestow any additional statutory rights and benefits upon it. This fact is evidently clear from Sonoran's own motion—it offers absolutely no case law, statutory language or any other such basis for its unilateral claim that it is entitled to the protections of Ariz. Rev. Stat. §12-821.01. In fact, both Sonoran's Water Supply and Management Services Agreement and Wastewater Treatment, Collection, And Management Services Agreement entered into with the Districts specifically provide that Sonoran is " . . . an independent contractor and **not an agent or employee** of [the Districts]". *See* FAC, Exhibits A and B respectively (emphasis added).

Although the language of a statute provides the primary evidence of the intent of the

legislature, courts will also infer intent from the statute's purpose. *See Sellinger v. Freeway Mobile Home Sales, Inc.*, 110 Ariz. 573, 575, 521 P.2d 1119, 1121 (1974). The "purpose behind [the Notice of Claim statute] is three-fold: (1) to afford the agency the opportunity to investigate the claim . . . ; (2) to afford the agency the opportunity to . . . . avoid costly litigation; and (3) to advise the legislature where settlement could not be achieved." *Mammo v. Arizona*, 138 Ariz. 528, 531, 675 P.2d 1347, 1350 (App. 1984) (citations omitted). "The idea is to provide the governmental agency with information so that it has an opportunity to settle a citizen's claim or to litigate it." *Hollingsworth v. City of Phx*, 164 Ariz. 462, 466, 793 P.2d 1129, 1133 (App. 1990).

It is clear from the purpose behind the Notice of Claim statute that it was not created to protect private corporations and companies that contract with the state or any of its political subdivisions. To find otherwise would be to bestow additional protections and further burden litigants who have claims against a private company or corporation that has contracted with the state or any of its political subdivisions.

Nonetheless, as set forth more fully in Lennar's Response to Defendant Pinal County and the 387 Districts' Motion to Dismiss, Lennar timely filed the Notice of Claim on September 14, 2004 for damages it incurred as a result of Sonoran and the Districts' failure to have Phase I operational by August 15, 2004. The Notice of Claim was well within the 180-day requirement of the statute. In any event, Lennar sent sufficient notice of its potential claims against Sonoran, the Districts and the Board of Supervisors as early as March 15, 2004 (Sonoran) and March 25, 2004 (the Districts and the Board of Supervisors) wherein each entity was advised of the defaults, the potential damages to Lennar as a result of the defaults

and each entity was afforded the opportunity to remedy the defaults.

IV. CONCLUSION

Sonoran's claim that it was entitled to a Notice of Claim is without merit. The statutory provisions requiring a notice of claim do not apply to Sonoran and, therefore, its' attempts to seek dismissal of the claims against it based upon an alleged failure to file a timely notice of claim is ill-founded. In any event, a Notice of Claim was timely filed. Therefore, denial of Sonoran's Motion to Dismiss is warranted.

DATED this 6th day of September 2005.

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IN AND FOR THE COUNTY OF MARICOPA

LENNAR COMMUNITIES DEVELOPMENT, INC., an Arizona corporation, Plaintiff, vs. SONORAN UTILITY SERVICES, L.L.C., an Arizona limited liability company, et al., Defendants.	Case No.: CV2005-002548 **PLAINTIFF'S MOTION TO CONTINUE HEARING ON DEFENDANTS' MOTION TO DISMISS** **Currently Set: October 14, 2005 at 8:30 a.m.** (Assigned to the Honorable Ruth H. Hilliard)

Plaintiff, through counsel undersigned, hereby requests this Court continue the Motion to Dismiss hearing currently scheduled for **October 14, 2005 at 8:30 a.m.** Lead counsel for plaintiff is scheduled to be out of state on that date on a pre-planned and pre-paid vacation. Plaintiff requests that this Court reschedule the hearing at a date and time convenient to the Court after October 18, 2005. This Motion is made in good faith and not for the purposes of delay.

1/23/06 Jompsett

DATED this 21st day of September 2005.

BEUS GILBERT PLLC

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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

LENNAR COMMUNITIES DEVELOPMENT, INC., an Arizona corporation, Plaintiff, vs. SONORAN UTILITY SERVICES, L.L.C., an Arizona limited liability company; GEORGE H. JOHNSON and JANE DOE JOHNSON, husband and wife; BOULEVARD CONTRACTING COMPANY, INC., an Arizona corporation; PINAL COUNTY BOARD OF SUPERVISORS, a political subdivision of the State of Arizona; LIONEL D. RUIZ, in his capacity as a member of the Pinal County Board of Supervisors; SANDIE SMITH, in her capacity as a member of the Pinal County Board of Supervisors; DAVID SNIDER, in his capacity as a member of the Pinal County Board of Supervisors; JIMMIE KERR, in his capacity as a former member of the Pinal County Board of Supervisors; THE 387 WATER IMPROVEMENT DISTRICT, a Pinal County Improvement District and a political subdivision of the State of Arizona; THE 387 WASTEWATER IMPROVEMENT DISTRICT, a Pinal County Improvement District and a political subdivision of the State of Arizona, Defendants.	**CASE NO. CV2005-002548** **JOINDER IN PLAINTIFF'S MOTION TO CONTINUE HEARING ON DEFENDANTS' MOTION TO DISMISS** (Assigned to the Honorable Ruth H. Hilliard)

SEP 29 2005

Defendants Pinal County Board of Supervisors, Lionel D. Ruiz, Sandie Smith, David Snider, Jimmie Kerr, the 387 Water Improvement District, and the 387 Wastewater Improvement District (collectively, the "Pinal County and 387 Districts Defendants"), by and through counsel, hereby join in Plaintiff's Motion To Continue Hearing On Defendants' Motion To Dismiss, but for reasons other than proposed by Plaintiff. The Pinal County and 387 Districts Defendants assert that it would be proper for the Court to first decide the change of venue issue before setting oral argument or deciding upon the motions to dismiss.

DATED this 28th day of September, 2005.

SCHLEIER, JELLISON & SCHLEIER, P.C.

By_____
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Attorneys for the Pinal County and
387 Districts Defendants

ORIGINAL and One Copy of the foregoing filed this 28th day of September, 2005, with:

Clerk of the Court
Maricopa County Superior Court
201 West Jefferson Street
Phoenix, Arizona 85003

COPY of the foregoing hand delivered this 28th day of September, 2005 to:

The Honorable Ruth H. Hilliard
201 West Jefferson Road
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COPY of the foregoing mailed this 28th day of September, 2005 to:

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